Supreme Court, U.S.
FILED

No. 01 . 613 AUG 8 2001

OFFICE OF THE CLERK

In The

Supreme Court of The United States

ROBERT J. PROKOP, M.D., PETITIONER

v.

UNITED STATES of AMERICA acting by and through the UNITED STATES OF DEPARTMENT OF AGRICULTURE, and FARM SERVICE AGENCY, RESPONDENT.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Robert J. Prokop M.D.
Pro Se

320 Hickory St., P.O. Box 14
Wilber, Nebraska 68465
(402) 821-2697

91 pp

QUESTIONS PRESENTED

1. Was the U.S. Constitutional Amendment 5 violated? AMENDMENT 5-... nor be deprived of life, liberty or property without due process of law ...

2. Was the U.S. Constitutional Amendment 14, Section 1, violated? AMENDMENT 14-... nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

3. Has The Law Governing Lawyers been violated? "A lawyer may not knowingly communicate ex parte with a judicial officer before whom a proceeding is pending concerning the matter, except as authorized by law."

4. Is there a conflict of judicial opinion between the Barthel v. U.S. Dept. of Ag., 181 Fed.Rep.3d 934 (Eighth Circuit, 1999) [Opinion delivered September 18, 1999], and this litigation on the same subject matter?

RULE 29.6 LISTING

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Robert J. Prokop, M.D., Petitioner respectfully petition for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals For the Eighth Circuit.

OPINIONS AND ORDER BELOW

The opinion of the United States Court of Appeals appears in Appendix 1 to the petition and is unpublished.

The opinion of the United States District Court appears in Appendix 3 and is reported at 91 F.Supp.2d 1301 (D Neb. 2000).

JURISDICTION

The date on which the United States Court of Appeals, Eighth Circuit, decided this case was May 10, 2000. No petition for rehearing was timely filed in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitutional Amendment 5
   "No person...nor be deprived of life, liberty or property, without due process of law..."

2. United States Constitutional Amendment 14, Section 1.
   "All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States of the State wherein they reside...nor shall any State deprive any person of life, liberty or property, without due

process of law, now deny to any person within its jurisdiction the equal protection of the law."

3. The Law Governing Lawyers, Column 2, Chapters 6 to 8, § 113(1).
"A lawyer may not knowingly communicate ex parte with a judicial officer before whom a proceeding is pending concerning the matter, except as authorized by law."

4. 527 CFR Part 12, Interim Final Rule, 180-V-FSAM. Third Ed., Amend 2, Nov. 1996, Section Subpart A12.2(a) (4) (Administrative Record (AR)) Page 61:
Farmed Wetland is a wetland that prior to December 23, 1985, was manipulated and used to produce an agriculture commodity, and on December 23, 1985, did not support woody vegetation and met the following hyrdologic criteria:

(i) Is inundated for 15 consecutive days or more during the growing season, whichever is less, in most years (50 % chance or more)

(ii) Farmed-wetland pasture is wetland that was manipulated and managed for pasture or hayland prior to December 23, 1985, and on December 23, 1985, met the following hydorlogic criteria.

(iii) Inundated or ponded for 7 or more consecutive days during the growing season in most years (50% chance or more), or (ii) Saturated for 14 or more consecutive days during the growing season in most years (50% chance or more).

5. Food Security Act of 1985,
Whether livestock actually grazes in pasture is not determinative of whether land should be considered pasture for wetlands purposes.

6. U.S.C.A. Cons. Amend. 5: Food Security Act of 1985 §§ 3821-3826.
United States Department of Agriculture's failure to notify farmer, prior to his request for determination, as to whether his land contained wetlands subject to Swampbuster restrictions was not violation of due process.

7. U.S.C.A. Const. Amend. 5, Food Security Act of 1985 §§ 1221-1223, as amended, 16 U.S.C.A. §§ 3821-3824, 7.C.F.R. § 11.8(c).
Exclusion of farmer's witnesses, at hearing on characterization of his land, for purpose of Swampbuster restrictions, was not violation of due process, farmer refused to summarize witnesses' expected testimony, despite repeated notice of such requirement, and in any event, he was permitted to supplement administrative record with witnesses' written statements.

8. 7 CFR § 623.2 Interim Final Rule, 180-V-FSAM, Third Ed.,
Generally, continued maintenance of a manipulation affecting a wetland is allowed to the extent that the manipulation existed prior to the effective date of the act.

9. 5 U.S.C. § 706(2) (A)
Review is limited to a determination of whether National Appeals Division (NAD) Determination upholding the classification of the sites in question as 'farmed wetland pasture' was arbitrary, capricious or abuse of discretion or otherwise not in accordance with the law.

10. 7 CFR § 623.2 Interim Final Rule, 180-V-FSAM, Third Ed.,12.5 (b) (vii) (B) (AR at 309)
The land is determined by NRCS to be a wetland created by a water delivery system, irrigation, irrigation system, or application of water for irrigation.

11. 18 NRCS Responsibilities F (AR at 98)
NRCS and FSA. Label on Certified Wetlands. (AW).
Artificial or irrigation-induced wetland.

STATEMENT OF THE CASE

The Petitioner sought judicial review of determination by the United States Department of Agriculture that portions of his land were "farmed wetland pasture' subject to Swampbuster restrictions. The Petitioner proceeded through all steps available to him in the United States Department of Agriculture and the National Appeals Division of the Department of Agriculture (U.S.D.A.) which was the requirement before proceeding to the Federal Court system. All appeal avenues were exhausted.

The Petitioner stated two causes of action:

> That the decisions made by the U.S.D.A. were arbitrary, and capricious; and that throughout the proceedings, the Petitioner was denied due process. The District Court held that these causes of action were not substantiated by the Court's findings.

I. WERE THERE VIOLATIONS OF CONSTITUTIONAL AMENDMENTS 5 AND 14, § 1?

A. SUBSTANTIVE DUE PROCESS

1. Agency Determination of "Farmed Wetland Pasture."

The exclusion of witnesses for the Plaintiff in this cause of action did not allow important data and information to be

presented to the Hearing Officer and the quasi-judicial hearing.

Several factual errors could have been corrected. The only presentation accepted by the Hearing Officer, Jack Richardson, and that of the National Appeals Division and Federal District Court was that of the Defendants. The criteria for determination of farmed wetland pasture is found in 7 C.F.R. § 12.31. With exclusion of testimony, the Plaintiff was not able to adequately contest the conclusions drawn prejudicially by the Defendants, who did not meet the criteria set forth in 7 C.F.R. 12.31.

The Federal Court stated:

"Plaintiff has the burden of proving that the agency decision was arbitrary, capricious, an abuse of discretion, or otherwise not substantiated by law." See Donner v. United States, 97 F3d. 999, 1002 (Eighth Circuit, 1996)."

The arbitrary, capricious standard is found at 5 U.S.C. § 706 (2) (A).

The District Court further concluded that:

"To refute the substantial evidence submitted by the agency, Plaintiff provided only his own observations and the observations of others which did not speak directly to the question of whether the agency's classification of the land is farmed wetland pasture was proper. Plaintiff has the burden of proving that the agency decision was arbitrary, capricious, or abuse of discretion, or otherwise not in accordance with law..Donner v. U.S. , Supra: 7 U.S.C. § 6997 (c) (4). (The appellate shall have the burden of proving that the adverse decision of the agency was erroneous.) He did not met it."

In a boxing match, handcuffing one of the participants gives an undue advantage to the other participant. By not allowing witnesses for the plaintiff, how could he meet the punch thrown by the U.S.D.A. and the National Appeals Division."

In a Supreme Court opinion written by Justice Blackmun in Pacific Mutual Insurance Co. v. Haslin, 111, S.Ct. 1032, 1040: (refers to Hurtado v. California, 556 U.S. 528-530.)

> "Hurtado, then clarified the proper role of history in a due process analysis: If the government chooses to follow a historically approved procedure, it is necessarily provided due process, but if it chooses to depart from historical practice, it does not necessarily deny due process...It merely suggested that due process could be assessed in such cases by reference to 'those fundamental principles of liberty and justice' which lie at the base of all our civil and political institutions."
>
> "The concept of 'fundamental justice' thus entered the due process lexion and was a description of what due process entails in general, but also as a description of what it entails when traditional procedures are dispensed with. As the Court reiterated in Twining v. New Jersey 211 U.S. 78, 29 S.Ct. 14, 'consistently with the requirements of due process, no change in ancient procedures can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation in process of law and protect citizens in his private right and guard against the arbitrary action of the government."

The government departed from due process by exclusion of evidence, refusal of testimony of witnesses, and changing established regulations previously approved by Congress establishing wetland guidelines.

In this ruling ancient procedures in due process were altered with impunity.

> "In any case, our due process opinions in recent decades have indiscriminately applied balancing analysis to determine fundamental fairness, without regard to whether the procedure under challenge was (1) a traditional one, and if so, (2) prohibited by the Bill of Rights. See e.g. Ake v. Oklahoma, 470 U.S. 68-87, 105 S.Ct. 1053-1098, Lansiter v. Dept. of Soc. Serv. of Durham Cty. 452 U.S. 18-25, 101 S.Ct. 2153-2139; Mathews v. Eldridge, 424 U.S. 319-335, 96 S.Ct. 893-908."

The 'fundamental fairness' doctrine established by Justice Blackman in this opinion has been overturned by the District Court in this cause of action. Handcuffing the Plaintiff without witnesses, presentation of witnesses and changing established rules does not meet the criteria of 'fundamental fairness.'

The handcuffs were further tightened when the edited transcript recordings from the initial National Appeals Division hearing were furnished the court but the United States Attorney's office failed to furnish such transcripts to the Petitioner as noted in the record by a lack of a filed certificate of service by the Respondents.

2. Notice of NAD Hearing and Exclusion of Witnesses.

At the beginning of the NAD hearing, the Hearing Officer stated that the hearing was being conducted under Title 7 of the Code of Regulations 7 CFR. Part 11. This regulation states that the hearing date must be given 14 days prior to the hearing.

The first notice sent out for a prehearing teleconference which was scheduled for May 20, 1997 contained no request for witnesses or what they were to testify about. This notice was mailed on May 8, 1997.

Since the Plaintiff was never afforded the transcript record of the hearings, the statements asking what witnesses that the Plaintiff was to present cannot be confirmed. Plaintiff did indicate the minimum number of witnesses while the Defendants gave no indication of any witness list they planned to testify.

When a listing of witnesses was requested by the National Appeals Division (NAD), the Plaintiff complied. There was no request at that time for the testimony that they would give, at the scheduled June 23rd hearing.

The Court recognized no summaries were requested when the opinion stated:

> "There was no specific discussion of the need to summarize the testimony of proposed witnesses, and if only notice to the Plaintiff regarding required disclosure in connection with witnesses he sought to call had been the prehearing telephone conference, Plaintiff might have had a valid due process claim. However, Plaintiff received several later notices of the required pre-hearing disclosure regarding proposed witnesses."

The Court failed to state that no prehearing telephone conference had been furnished to the Petitioner. This fact is evidenced by the lack of a certificate of service in the record confirming that such evidence had been furnished to the Petitioner.

The Court recognized that no demands were made for disclosure until after the requested witness list had been received; changing the rules of the game in midstream. The Court failed to recognize that the Defendants did not receive a similar request. This action was prejudicially favoring the Farm Service Agency.

The witness list from the Plaintiff listed all possible individuals that had knowledge and expertise concerning the controversial wetlands determination. This involved six NRCS employees and

eleven individuals from the area as well as experts in what constitutes the requirements for wetlands from an evidenciary standpoint. Since there was a distance of 110 miles to Omaha for the hearing, the number that could attend was questionable at best. There was no request as the Court noted, for testimony summary, yet the Court opinion states this was the first notice of requested summary of expected testimony.

On June 4, 1997, Mark Bowen who represented the Department of Agriculture as the Farm Service Agency Executive Director, wrote a response to the Plaintiff with his list of witnesses without a summary of what they were to testify about. Mr. Bowen was not the hearing officer and had no authority to give a second notice of summary. He represented the Defendants and was a party to the case, not a judiciary representative. The Court again indicated this was a second notice on behalf of the hearing officer. (AR 349).

The letter sent to Mr. Bowen indicated the witness list would remain the same but that the stipulations requested would speed the trial. No mention was made of refusal of witness summaries as the Court noted in its opinion.

Regulations governing NAD hearings provide that during the time between the filing of an appeal and the issuance of the final determination by the NAD, "no officer or employee of the Division shall engage in ex parte communications regarding the merits of the appeal with any person having any interest in the appeal pending before the Division, including any person in an advocacy or investigative capacity. 7 C.F.R. § 11.7 (a) (1).

Mr. Bowen disregarded the rule with this letter and disregarded judicial rules of procedure by contacting the Petitioner directly with this correspondence.

The Plaintiff, in attempts to comply, then asked the Hearing Officer and not the Defendants, what he desired. The Hearing Officer's pre-hearing notice had no mention

of summary testimony from witnesses to be presented even though the Court again errored in determining that it had.

The originally scheduled June 23 hearing was unilaterally canceled by the NAD with Plaintiff not receiving notification until June 22. A letter revoking the waiver was immediately sent and the NAD complied by resetting the hearing for July 1, giving the Plaintiff forty-eight (48) hours notice. A listing of witnesses was sent to the NAD of the individuals that could make the trip to Omaha, but no mention of that was present in the opinion.

"A change of hearing officer was made by the National Appeals Division."

When Ann Gilbert, acting Appeals Division Director, made the first request in writing for a summary of what witnesses would say in her June 18th letter even though the Court states in the opinion that it was the fourth request, the following summarization was sent back to cover all witnesses.

"All witnesses have been involved with or have knowledge of the area in question which is the basis of the hearing through either private or governmental contact."

A list of seven witnesses that could attend the hearing was submitted to the National Appeals Division."

The summary meets the request for information as requested by the National Appeals Division.

The Defendants never did submit a summary of the testimony that their prospective witnesses would give, even though requested.

The Notice of rescheduled hearing from the National Appeals Division contained no guidelines concerning witnesses or their testimony.

The Code of Regulations (Title 7, 7 CFR, Part 11) states that "all witnesses called by the Farm Service Agency must comply with the same procedure that an Appellant must follow; namely that a statement must be made concerning the testimony that will be submitted by those witnesses.' The Hearing Officer allowed testimony without compliance. This is an example of changing rules to fit the circumstances.

In Doty v. United States, 24 C1.Ct. 615, 631 (1991), the Claims Court held that the Agricultural Stabilization and Conservation Service's (ASCS) Deputy Administrator for State and County Operation failure to call a witness requested by the aggrieved program participant at an administrative appeal hearing was an abuse of power. The ASCS was the agency name before being changed to Farm Service Agency (FSA).

The Court ignored this vital decision in this litigation.

The Court further disallowed depositions to gather evidence in this cause of action even though the Federal Rules of Civil Procedure (F.Civ.R.Proc.) states:

"Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness."

Rule 26 states: (4) Trial Preparation:

"Experts. (A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial."

Rule 26(b) (4) states such witnesses are to be deposed if the plaintiff or defendant makes such a request.

This made preparation for any judicial action much more difficult if not impossible. "*The burden of proof*" requested by the Court is impossible without preparation.

The Court's conclusion concerning due process with regard to the above descriptions states:

"Plaintiff may not like the procedural rules governing appeal hearings before the NAD, but the actions by the Hearing Officer regarding Plaintiff's proposed witnesses did not violate due process."

The question rises, does the NAD rules apply only to the Appellant, as in this hearing; or do the hearing regulations apply equally to the Farm Service Agency.

The facts clearly show, it not only violated due process, it trampled all over the United States Constitutional Amendments granting due process to every citizen and the right of a non-prejudicial hearing.

3. Reliance on Allegedly False Statement.

Because of not allowing testimony before the Hearing Officer, several witnesses submitted depositions to the Court. One such deposition was submitted by Henry "Bud" Santin Jr. who farmed the land for the Plaintiff.

State Wildlife Biologist Gerald Jamrog took out of context the statement made (AR at 276-77 and 281), (AR at 25); when he described the area as:

> "The Southeast corner which contains a dry creek channel which courses through the property, has always been wet and difficult to farm '*because of*' standing water after drainage from Fred Whitney's farm which drains the Northern Section of land toward the Loup River and enters Prokop's property through a large culvert under a gravel road. The serious difficulty in farming started about ten years ago. (Beaver Dam explanation).
>
> A number of beavers were killed and they

> finally moved out about two years ago. The dry creek bed which was on Robert Prokop's southeastern corner, contained vegetation, muck, crop residue such as stalks, and grassy material. The cattails and other vegetation on the bank started about ten years ago when the beavers had dammed the canal on Frank Santin's property." (Property adjacent to Plaintiffs) Frank Santin did not allow Plaintiff to dredge out his canal causing damming and artificial wetlands. 7 CFR §12.1 (b) (vii) (c)

The Court and all Hearing Officers jumped on 'has always been wet and difficult to farm' but they leave out the explanation clause, because of. *Because of* means due to the fact that.

Henry "Bud" Santin Jr., was on the list of witnesses to testify but the Hearing Officer refused to hear his explanation.

Yet that same hearing officer, United States Department of Agriculture employees, and the Courts are willing to take the government's interpretation of that statement without his explanation of what his statement meant as he had written it. He further mentioned in his deposition that proper drainage on the Frank Santin property would alleviate the wet area and standing water.

The Federal Court drew the following conclusion:

"However it is equally plausible to conclude that has 'always' been wet but that the wetness was not a serious problem until compounded by the beaver dam."

The Court clearly adds to the interpretation of that statement by making conclusions rather than factual determinations.

"In summary, Jasmer's statement was not false. Reliance upon this statement by the NAD Hearing Officer and Director did not constitute a due process violation."

The question arises, is it due process when a deposition is taken, the witness is not allowed to testify? Are the governmental agencies allowed to interpret testimony for the Court as they desire for their advantage?

Why is the *explanation clause* conveniently left out of the statement in order to substantiate a false determination of the intended testimony of the witness?

This obviously is stomping on due process and equal protection granted by the Constitution. Interpretation without factual determination is not judicial procedure, even though the District Court is this statement concurred in that opinion.

II. WAS EX PARTE COMMUNICATION PRESENT?

The Law Governing Lawyers as adopted and promulgated by The American Law Institute at Washington, D.C., may 12, 1998, Vol. 2, Chapters 6-8, 113, Improperly Influencing a Judicial Officer, (1) A lawyer may not knowing communicate ex parte with a judicial officer before whom a proceeding is pending concerning the matter, except as authorized by law.

Ex parte communication with a judicial official before whom a matter is pending violates the right of the opposing party to a fair hearing and may constitute a violation of the due process rights of the absent party. Ex parte communication also threatens to embarrass the parties' relationship with the judicial officer, requiring the officer to improperly acquiesce in his decision making opinions.

In the Court dissenting opinion written by Justice Stevens in Patterson v. Illinois, 487 U.S. at 301:

"The Court should not condone unethical forms of trial preparation by prosecutors or their investigators. In civil litigation it is improper for lawyer to communicate with his or her advisory's client

without either notice to opposing counsel or the permission of the court. An attempt to obtain evidence for use at trial by going behind the back of one's adversary would be not only a serious breach of professional ethics but also a manifestly unfair form of trial practice."

Throughout the Court's opinion in this cause of action, quotes from transcript records (TR) are continually used as factual evidenciary testimony for judiciary conclusions.

The question arises, who furnished the Court the TR's without properly notifying opposing counsel? Why were not those records given to opposing counsel if they were to be used as evidenciary material for the court? Why wasn't a verbatim transcript made available to the opposing counsel instead of inaudible tapes of the hearing alone?

The Court did discuss the failure of the Hearing Officer to provide partial transcripts concluding that Plaintiff has provided no evidence to indicate he requested and was not provided with a copy of the agency record.

As opposing counsel, it is disconcerting to find transcript record quotes which have never been furnished to counsel, prior to a decision being made and unable to review, cross examine and verify claims.

All materials presented the Court by the Plaintiff were delivered to the United States Attorney's office for opposing counsel, Sally R. Johnson, with certificate of service, on record.

The U.S. Attorney has no record that they ever sent a transcript record to the Plaintiff.

The U.S. Attorney's office has been responsible for placing those transcript recording documents in the Court's hands on an ex parte basis; thus gaining a judicial advantage in decisions rendered in this case.

This is not only a violation of due process and ethical standards as set forth by law, this reveals to what length an agency will go to influence the Federal Courts without restraint.

This action is a clear violation by Sally R. Johnson, Assistant U.S. Attorney and makes questionable any decisions made by the District Court.

III. CONFLICTING OPINIONS IN THE EIGHTH CIRCUIT COURT OF APPEALS.

Circuit Judges McMillian, Beam and Loken in the Barthel v. United States Department of Agriculture, Daniel Glickman, Sec. 181, Fed. Rep. 3d. 934; (Eighth Circuit, 1999) is found in Appendage 31. The opinion was published after appeals were due in this matter.

The request denied by the U.S.D.A. was for manipulation of a ditch fed by a culvert. Some quotations from the opinion are as follows:

> "This is not to say that the level of a ditch or culvert cannot provide an accurate indication of the water regime which previously existed...In the Barthels' case, the USDA's findings for the ditch and culvert depths apparently conflict with the water regime that existed prior to December 23, 1985. In such a conflict, the government's position is that the level of the ditch should win, at the expense of the prior conditions of the land. In short, the means are more important than the ends. We disagree. The unambiguous focus of the statute and implementing regulations is to maintain the status quo of the manipulated wetlands-- not the drainage ditch."

> "The burden is on the government to show that the proposed maintenance, in this case clearing the ditch so that the hay meadow is not underwater, exceeds the scope and effect of the original manipulation. (Cf. Downer, Supra at 1009.) However,

> this does not give the agency the right to arbitrarily define what the original scope and effect was. It is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law for the agency to pick an original manipulation regardless of how it affects the use of the land?

"The record shows that the ditch is continually silted-in by natural conditions...and must be periodically cleaned out."

M. Arnold, R. Arnold and Fagg, Circuit Judges, in this appeal, with similar circumstances and the same initial call on maintenance of a ditch and culvert, ruled in disagreement with the Barthel v. U.S. et al. Supra, case.

The original cause of action required a Wetlands ruling; one that was not sought by the Petitioner. The cause of action was for the same purpose when Petitioner submitted a request to clean out a silted-in ditch resulting from a third parties action. The rationale in the Barthel case was not used in this cause of action and appeal.

IV. IGNORING RULES ESTABLISHED BY CONGRESS.

Certain rules established by the FSA with Congressional approval were ignored in this ruling. The rules and definitions state that irrigation run off or irrigation ditches can not be declared wetland. In this decision the Court approved changing the rules involving irrigation procedures. These rules were established and approved by FSA and Congress.

This was exemplified by the ruling found on Site B App. 6, Footnote 4.

This violates due process, fundamental fairness, and is a abuse of power.

REASON FOR GRANTING THE WRIT

The request for a writ of certiorari should be granted for the following reasons:

1) A review of the violations of due process and equal protection clauses of the Constitutional Amendments 5 and 14 which were ignored by the Federal District Court and Court of Appeals in their decisions should be accomplished to set standards for future actions involving these principles when agencies of the United States Government are involved.

2) Ex Parte communication by the Department of Justice through the United States Attorney's office with the United States District Judge where material was shared without proper notification of opposing counsel must be addressed to prevent future governmental misconduct.

3) Rulings in the Bartel v. U.S., and this cause of action have not been consistent and need to be addressed by the Supreme Court for remedy as to what is the regulations and statutory provision interpretations, for the lower Courts to follow. These two opposing decisions were handed down in the same Court of Appeals.

Definitions of what is meant by statutory terms such as haylands and pasture need to be consistent with actual meanings of the word. Clarification of opinions and word usage are essential for proper communication between Congressional, Judiciary, and Executive branches as well as the citizenry of the United States.

As noted by United States Court of Appeals Judge Alex Kozinski in the Wall Street Journal regarding comments made on summation of entitlement to privacy on use to Court computers sending E-mail or Internet access; he stated: " Hell hath no fury a bureaucrat un-turfed."

This statement is applicable to this cause of action and request.

CONCLUSION

The Petitioner prays that the Supreme Court will review, reverse and remand the opinions set forth by the Eighth Circuit Court of Appeals and the United States District Court for the State of Nebraska in the above cause of action.

DATED: August 8, 2001.

Respectfully Submitted

ROBERT J. PROKOP, M.D.,
Petitioner

BY: _____

Robert J. Prokop M.D. Pro Se
320 Hickory Street, P.O. Box 14
Wilber, Nebraska 68465-0014
(402) 821-2697

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APPENDIX

United States Court of Appeals
FOR THE EIGHT CIRCUIT

No. 00-2232NE

Robert J. Prokop, M.D.,	*	4970V3395
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Appellant,	*	U.S. DISTRICT COURT
	*	DISTRICT OF NEBRASKA
v.	*	01MAY10 AM11:26
	*	GARY D. MCFARLAND
	*	CLERK
USDA, United States of America, acting by and through the United States Department of Agriculture and Farm Service Agency,	*	On Appeal from the United States District Court for the District of Nebraska.
	*	
Appellee.	*	[Not To Be Published]

Submitted: April 30, 2001
Filed: May 10, 2001

Before MORRIS SHEPPARD ARNOLD, RICHARD S. ARNOLD, and FAGG, Circuit Judges.

PER CURIAM.

Robert Prokop appeals from the District Court's[1] decision affirming the United States Department of Agriculture's classification of his property as "farmed wetland pasture." For the reasons explained in the District Court's thorough opinion, we conclude substantial evidence in the record supports the agency's finding that the property met the criteria for farmed wetland pasture. The agency's decision was not arbitrary or capricious. See 7 C.F.R. § 12.2(a) (2001) (definition of farmed wetland pasture); Downer v. United States, 97 F.3d 999, 1002 (8th Cir. 1996) (per curiam) (court looks to whether agency considered all factors Congress intended it to consider, whether agency considered factors Congress did not intend it to consider, and whether there is lack of rational connection between facts found and decision made). We have considered Prokop's due process arguments and conclude that they fail, also for the reasons laid out in the District Court's opinion.

Accordingly, we affirm. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[1]The Honorable Richard G. Kopf, Chief Judge, United States Court for the District of Nebraska.

App. 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROBERT J. PROKOP, M.D.,	)	
	)	4:97CV3395
Plaintiff,	)	
vs.	)	**MEMORANDUM**
	)	**AND ORDER**
UNITED STATES OF AMERICA,	)	
acting by and through the	)	FILED
UNITED STATES DEPARTMENT	)	U.S. DISTRICT COURT
OF AGRICULTURE and FARM	)	DISTRICT OF NEBRASKA
SERVICE AGENCY,	)	00MAR29 AM 8:27
	)	GARY D. MCFARLAND
Defendant.	)	CLERK

This is an action for judicial review of a final agency determination of the National Appeals Division (NAD) of the United States Department of Agriculture (USDA) concerning the classification of certain farm property owned by Plaintiff as "farmed wetland pasture." By previous order of this court (filing 77), this action is being resolved as if cross-motions for summary judgment had been filed.[1]

[1]The parties were directed to submit proposed findings of fact indexed to the record and conclusions of law. Plaintiff, who appears pro se, did not. He instead submitted a "Pre-Trial Brief." Defendant submitted proposed findings of fact and conclusions of law together with a brief. In response, Plaintiff submitted another brief. Plaintiff's submissions do not focus on the key issue: Was the final agency decision arbitrary, capricious, or an abuse of discretion? This court has parsed through Plaintiff's submissions to ascertain why Plaintiff believes the final agency action should be overturned on review. This memorandum and order addresses only those arguments of Plaintiff which merit discussion.

I. BACKGROUND

Plaintiff Robert Prokop owns farm land located in Nance County, Nebraska, which is know as Farm No. 1347, tract 820, in the Records of the Nance County Committee of the Farm Service Agency (Administrative Record at 7.)[2] Plaintiff has participated in farm programs conducted by the USDA in connection with his operation of Farm No. 1347 (AR. at 236). By letter dated August 6, 1995, Plaintiff informed the USDA Agricultural Stabilization and Conservation Service (now known as the Farm Service Agency),[3] of his intention to

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[2]Subsequent references to the Administrative Record will be cited as "AR." The record before the court also includes a transcript of the hearing before the NAD, cited as "TR.," and a transcript of a prehearing telephone conference call held May 20, 1997, cited as "Prehearing TR." The Administrative Record and transcripts are part of Filing 28. The Administrative Record contains copies of the original exhibits from the NAD hearing are invalid or inadmissable because global positioning technology was not used to produce them is without merit. The exhibits and maps are clear enough to support the agency's final determination. They do not have to be perfect.

[3]Many of the documents in the administrative record use only acronyms or abbreviations for the many agencies and statutes involved in this determination. For clarity, I identify all of the acronyms and abbreviations in this footnote.

ASCS	The United States Department of Agriculture Agricultural Stabilization and Conservation Service, a predecessor agency to the Farm Service Agency
FSA	The Farm Service Agency, successor to the United States Department of Agriculture Agricultural Stabilization and Conservation Service
COC	See Nance County Committee
NAD	The National Appeals Division of the United Sates Department of Agriculture

clean out a canal located on property abutting Farm No. 1347 in order to improve drainage in certain areas of farm No. 1347 (A.R. at 145). This was a cautionary step to protect Plaintiff's continued eligibility for USDA farm program benefits. See, e.g. 7 C.F.R. §§ 12.7, 12.4(h). The Food Security Act, 16 U.S.C. §§ 3821-3824, (commonly known as Swampbuster) and its implementing regulations provide that farmers who "convert" a wetland after December 23 1985, through manipulations which affect wetlands in a prohibited manner, forfeit their eligibility to receive USDA program payments and loans. See, e.g., 7 C.F.R. §12.4. Generally, continued maintenance of a manipulation affecting a wetland is allowed to the extent that the manipulation existed prior to the effective date of the act. 7 C.F.R.

Upon receipt of Plaintiff's August 6, 1995 letter, the USDA made a determination as to whether cleaning out the canal would affect wetlands in a manner which would violate Swampbuster and thereby affect Plaintiff's eligibility to participate in USDA farm programs. By November 7, 1995 letter from William Gilg, Resource Conservationist in the Fullerton Field Office of the NRCS, the USDA notified Plaintiff that two areas located on Farm No. 1347, consisting of a total of eight

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Nance County Committee	The Nance County Committee of the Farm Service Agency, referred to in some documents as COC, or Nance County CFSA (Consodidated Service, successor agency to the Soil conservation Service
NRCS	The United States Department of Agriculture Natural Resources Conservation Service, successor agency to the Soil Conservation Service
SCS	The Soil Conservation Service, predecessor agency to the Natural Resources Conservation Service
Swampbuster	The Food Security Act, 16 U.S.C. §§ 3821-3824
USDA	United States Department of Agriculture

acres,[4] were considered "farmed wetland" subject to Swampbuster restrictions, but that Plaintiff was free to clean out the canal because the proposed action was considered allowable maintenance which would not affect his eligibility for USDA farm programs (AR. At 136-38). The letter advised Plaintiff that he could request a reconsideration by making a request to the NRCS within 15 days.

By letter dated November 8, 1995, Plaintiff objected to the farmed wetland classification, asserting that he sought not a reconsideration but a ruling that the land was wetland followed by appropriate notice to Plaintiff and an opportunity for Plaintiff to appeal the wetland ruling (A.R. at 206).[5] Plaintiff's November 8, 1995 letter

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[4]Various parts of the Administrative Record, including the Weland Inventory Map (A.R. at 197 and filing 46) and the filed visit reports (A.R. at 221-27) refer to "Site A" and "Site B." Site A consists of 3.1 acres in the southeast corner of Farm No. 1347. Site B consists of 4.9 acres located in an area on the east side of Farm No. 1347, roughly halfway between the north and south boundaries of the farm. The Administrative Record contains documents which specifically define the areas in question as three parcels of land in Farm No. 1347, Tract 820, Fields 1,2, and 3. (See, e.g., A.R. at 4, 7, 183.) The parcels collectively referred to as Site B including contiguous parts of Field 1 and Field 2 consisting of a total of 4.9 acres. (See, e.g., A.R. at 197, 221-27) For simplicity, I will refer to Site A and Site B.

[5]This is one indication of Plaintiff's misunderstanding of the process set in motion by his request to clean out the canal. He did not acknowledge that the November 7 letter constituted a notice of a determination that the land in question was "wetland" and was wetland subject to Swampbuster restrictions (at this point, the agency took the position that the land was "farmed wetland"), nor that the "reconsideration" referred to in the November 7 letter was the opportunity to appeal the determination that the land in question was wetland subject to Swampbuster restrictions.

This misunderstanding is compounded in two ways: Plaintiff denies the validity of the process by which land is determined to be wetland subject to Swampbuster restrictions and Plaintiff considers the term "wetland" to be synonymous with the legal conclusion that the land is "wetland subject to Swampbuster restrictions." These misunderstandings are addressed infra under the "Substantive Due Process" heading.

was treated as a request for reconsideration. Two NRCS employees (Al Mittan and James Huntwork) met with Plaintiff and conducted an on-site investigation on December 1, 1995 (A.R. at 201). This was the first of two field visits that were made to Plaintiff's farm during the review process. Upon reconsideration, the Ord field office of the NRCS notified Plaintiff on January 23, 1996 of the agency's determination that Sites A and B would be classified as "farmed wetland pasture" rather than "farmed wetland" (A.R. at 201). This was the first of five agency reviews of the wetland determination.

Plaintiff appealed the determination that the two identified areas in Farm No. 1347 were farmed wetland pasture by a February 18, 1996 letter to Stephen H. Chick, the State Conservationist of the NRCS (A.R. at 199). In response to this appeal, on May 1, 1996, NRCS employees Gerald Jasmer, Lyle Rasmusen, and Richard Torpin conducted a field visit to the land in question (A.R. at 192). This was the second field visit to the site. By letter dated May 30, 1996, the State Conservationist of the NRCS made a final technical determination that the land in question was "farmed weland pasture" (A.R. at 128-29). This was the second agency review of the wetland determination.

Next, Plaintiff appealed the decision of the NRCS State Conservationist to the FSA Nance County Committee (A.R. at 191). After conducting a hearing on Plaintiff's appeal, the FSA Nance County Committee upheld the classification as farmed wetland pasture (A.R. at 104-111). This was the third agency review of the wetland determination. At the hearing, the Nance County Committee was advised that its review was limited to determining whether there was an error in the State Conservationist's determination (A.R. at 108) and found no error in that determination (A.R. at 104). Plaintiff was advised of these findings by April 10, 1997 letter signed by Bruce Coffey, the executive director of the FSA Nance County Office (A.R. at 104-06).

On April 22, 1997, Plaintiff appealed the FSA Nance County Committee's decision to the USDA's National Appeals Division (NAD) (A.R. at 375). A prehearing conference was held by Hearing Officer Paul Handley of NAD on May 20, 1997 (Prehearing T.at ii). Based on the understanding that the hearing would be held June 23, 1997 (see A.R. at 337), on May 27, 1997, Plaintiff waived the requirement that the hearing be held within 45 days of April22, 1997 (the date he filed his administrative appeal) (A.R. at 363). The hearing was scheduled for June 23, 1997 (A.R. at 351-54), and was postponed because of a dispute over whether all witnesses Plaintiff sought to call at the hearing would be made available in light of Plaintiff's refusal to submit a summary of the testimony he sought from these witnesses (A.R. at 339-40). On June 24, 1997, upon notice that the June 23 hearing date had been postponed, Plaintiff sent a letter withdrawing his previous waiver and demanding that the hearing be held not later than July 7, 1997 (A.R. at 337). The NAD received this letter on June 25, 1997. On June 26, 1997, in response to Plaintiff's demand, NAD scheduled the hearing for July 1, 1997 (A.R. at 332) and reassigned the hearing to Hearing Officer Jack Richardson (A.R. at 331), as Hearing Officer Handley's schedule would not permit him to conduct the hearing by July 7 (A.R. at 7).

At the July 1, 1997 hearing, the Hearing Officer gave both parties additional time to supplement the record. They did so. After the hearing and the supplementation of the hearing record by the parties, on July 22, 1997, Hearing Officer Richardson issued a written opinion upholding the classification of the two areas in dispute as "farmed wetland pasture" (A.R. at 30-36). This was the fourth agency review of the wetland determination. Plaintiff requested review of this decision by the Director of NAD. On September 22, 1997, the NAD Director issued his "Director Review Determination" which upheld the classification as "farmed wetland pasture" (A.R. 4-6). The NAD Director's determination is the final administrative decision in this matter (and the fifth agency review of the wetland determination). Plaintiff then filed this appeal of the final agency determination upholding the "farmed wetland pasture" determination.

The Swampbuster statutes and regulations were amended in 1996,[6] and the 1996 amendments laws applied to the agency action regarding Plaintiff's property. The interim proposed regulations, which were ultimately those adopted, were those used by the agency. See A.R. at 41-90, TR. at 16-17.

II. DISCUSSION

A. STANDARD OF REVIEW

The agency's factual finding that certain farm property owned by Plaintiff is farmed wetland pasture is a classic example of a factual dispute implicating substantial agency expertise. Downer v. United States, 97 F.3d 999, 1002 (8th Cir. 1996) (questions regarding agency determinations that farmer's land was converted wetland rather than artificial wetland and that wetland conversion did not commence prior to effective date of Swampbuster were "classic examples of factual disputes implicating substantial agency expertise.") Accordingly, review is limited to a determination of whether the NAD Director's determination upholding the classification of the sites in question as "farmed wetland pasture" was "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Id. (Quoting 5 U.S.C. § 706(2)(A)). The narrow review includes a de novo review of the administrative record "to determine 'whether the decision was based on a consideration of relevant factors and whether there has been

[6]One of the proposed 1996 amendments to Swampbuster would have provided an exception for wetlands under one acre. This proposal was never enacted into law. See Daryn McBeth, Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996, 21 Harv. Envt'L.Rev. 201,241 n.256, 250-53 (1997). At various stages during the determination and review process affecting Plaintiff, Plaintiff asserted that there was an "under one acre" exception applicable to the wetlands on Sites A and B. Agency employees sought this exception in the statutes, but understandably did not find it since the proposal did not become law. Plaintiff's continued belief in this nonexistent exception likely contributed to mistrust of the agency and continued confusion by Plaintiff.

a clear error of judgment.'" Id. (Quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)). The nature of this review is clear:

> To perform this review the court looks to whether the agency considered those factors Congress intended it to consider; whether the agency failed entirely to consider an important aspect of the problem; whether the agency decision runs counter to the evidence before it, or whether there is such a lack of a rational connection between the facts found and the decision made that the disputed decision cannot "be ascribed to a difference in view or in the product of agency expertise." Motor Vehicle Mfg'rs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). If the agency itself has not provided a reasoned basis for its action, the court may not supply one. Id.
>
> Nonetheless, the reviewing court may not substitute its judgment for that of the agency and must give substantial deference to agency determinations. Id. This deference is particularly appropriate when the agency's determination in issue concerns a subject within the agency's own area of expertise. Marsh, 490 U.S. at 377-78. An agency making fact-based determinations in its own field of expertise, particularly where those determinations are wrapped up with scientific judgments, must be permitted "to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Id. At 378.

Downer, 97 F.3d at 1002.

B. SUBSTANTIVE DUE PROCESS

1. Agency Determination of "Farmed Wetland Pasture" 7 CFR § 623.2 Interim Final Rule, 180-V-FSAM, Third Ed.,

At the NAD hearing, both parties agreed that Site A and Site B were wetlands. They disagreed as to whether they were wetlands subject to Swampbuster restrictions. Plaintiff asserted that Site A should be considered an "artificial wetland" because it resulted from the activities of beavers in the canal on the east side of Plaintiff's property, and Site B should be considered an "artificial wetland" because it was created by irrigation runoff after he began irrigating the farm in the 1970's. (T.R. at 24-25, 33.) "Artificial wetlands" are not subject to Swampbuster restrictions. The agency asserted that the sites were "farmed wetland pasture" (and farmed wetland pasture is subject to Swampbuster restrictions). The final agency determinations that the sites are farmed wetland pasture.

The regulations define"farmed wetland pasture" as

> wetland that was manipulated and managed for pasture or hayland prior to to December 23, 1985, and on December 23, 1985, met the following hydrologic criteria:
>
> (i) Inundated or ponded for 7 or more consecutive days during the growing season in most years (50 percent chance or more), or
>
> (ii) Saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more)

7 C.R.R. § 12.2(a). Thus, to be "farmed wetland pasture," land must (1) be wetland, (2) have been manipulated and managed for pasture or hayland prior to the effective date of Swampbuster, and (3) on the effective date of Swampbuster (December 23, 1985) have met specified hydrologic criteria. There is substantial evidence in the record to support the final agency determination that Sites A and B are "farmed wetland pasture."

Plaintiff stipulated that the land was "wetland" at the administrative hearing (T.R. at 22-24, 32-33). In addition, the on-site inspection data (A.R. at 173, 221-27, 232, 257-58) supports the wetland finding, as do the photos, soil maps, soil surveys, and soil lists in the record (A.R. at 209-20). Site A has always been a natural drainage way which carried precipitation and snow melt from land south of Plaintiff's property across the corner of Plaintiff's farm onto land directly east of Farm No. 1427, and into the Loup River, which runs from west to east north of Farm No. 1347. (A.R. at 267, 269, 276.) Soil mapping commenced in 1955 and a 1960 soil survey indicate that the soil on Site A and Site B is hydric (A.R. at 209, 215). The NAD hearing included credible testimony from NRCS employees with personal knowledge that both Site A and Site B are naturally occurring wetlands which existed well before drainage on either site was manipulated by human activity (T.R. At 90-105). Plaintiff acknowledged at the NAD hearing that both sites were wet in times of precipitation (T.R. at 33-36, 72). Plaintiff presented affidavits from his witnesses which stated that, prior to 1985, water flowed through Site A when it rained or during snowmelt (A.R. at 267, 269), and that the property had always been difficult to farm due to wetness (A.R. at 276). Thus the first part of the definition of "farmed wetand pasture" is met.

There is no question that Sites A and B had been manipulated prior to December 23, 1985 (the effective date of Swampbuster) through the construction canal and the 1972 land leveling activities described in the record. Whether or not livestock actually graze in a pasture is not determinative of whether land should be considered pasture for Swampbuster purposes. Plaintiff himself referred to the land in question as pasture in a letter Farm Service Agency dated February 25, 1983 (A.R. at 243). Neither site had been cropped for over five years except for a small stand of alfalfa (a form of hay) (A.R. at 236-42.[7]

[7]Plaintiff's briefs assert that the land was not cropped because he had been told to use this as set-aside land, and that he was unable to prove this because he was

The property was fenced, an indication of pasture. The NRCS officials reasonably concluded that the property was pasture based on Plaintiff's use of the property and their visual inspection. This satisfies the second part of definition: The land was pasture manipulated prior to the effective date of Swampbuster.

To be "farmed wetland pasture, Sites A and B must have met specified hydrologic criteria on December 23, 1985. On that date, the sites must have been either inundated or ponded for 7 or more consecutive days during the growing season in most years or saturated for 14 or more consecutive days during the growing season in most years. The agency established that these hydrologic criteria were met. The agency relied upon a soil map of an area including Plaintiff's land which was completed as a part of a soil mapping project begun in 1955 (the mapping was completed by the SCS, the predecessor agency to the NRCS). (A.R. at 209 (and filing 46), R.R. at 92.) The agency also relied upon a 1960 soil survey (A.R. at 210-20). Both the 1955 soil map and 1960 soil survey indicate that Sites A and B met the hydrologic criteria. The soil on Site A was classified as "Cs" (Cass Fine Sandy Loam), which is a classification for soils with a water table of 0-1 foot and having hydric soils present which meet saturation criteria (A.R. 209, 215). The soil on Site B was classified as soil type "Le" (Leshara Silt Loam), which is also a classification for soils with a water table created on the basis of soil surveys showed an intermittent stream in the areas making up both sites (T.R. at 209 (and filing 46)). The soil maps, soil surveys, soil lists, aerial photography and on-site inspection data indicated the presence of hydric soils which meet the saturation requirement. The agency's reliance on the soil maps and surveys to identify hydric soils is authorized by the regulations. 7 C.F.R. §12.31.

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prevented from presenting live testimony of witnesses. As explained later in this opinion, Plaintiff was prevented from presenting live testimony because he refused to comply with applicable procedural rules, and could have supplemented the record with evidence as to why the land had not been cropped, but chose not to.

The technical data the agency relied upon to establish the third part of the "farmed wetland pasture" definition is within an area of substantial agency expertise, and the agency's determination is entitled to substantial deference. Downer, 97 F.3d at 1002.

To refute the substantial evidence submitted by the agency, Plaintiff provided only his own observations and the observations of others which did not speak directly to the question of whether the agency's classification of the land as farmed wetland pasture was proper. Plaintiff has the burden of proving that the agency decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See Downer, 97 F.3d 999; 7U.S.C. § 6997(c)(4) ("The appellant shall have the burden of proving that the adverse decision of the agency was erroneous."). He did not meet it. The administrative record, as a whole, contains substantial evidence to support the agency's determination, and as in Downer, there is

> no evidence that the agency considered any factors Congress did not intend it to consider in making its determination, nor is there any indication that the agency failed to consider an important aspect of the wetlands determination problem. The agency's technical determination is squarely within its field of expertise and was made in reliance on its own qualified experts' examination of the sites and other relevant data. The decision was rational and does not run counter to the evidence. . . . Thus, the dispute is within the realm of agency expertise, and not the result of arbitrary and capricious decision-making.

Id. At 1003-04.

In making its determination, the NAD observed that "FSA acknowledges the area has peculiarities which exist concerning the development of the wetlands [referring to improper maintenance of the canal on property adjacent to Plaintiff's property and the beaver

activity]," and made this statement: "[I]f drainages are cleaned out and the areas became drier, a request for a new determination could be made." (A.R. at 7.) This is a clear indication that the agency did not fail to consider any important aspect of the wetlands determination on Site A and B.

2. Artificial Wetland

Plaintiff contends that the sites in question are artificial wetland, asserting that his neighbor's construction of a canal in 1985 near Site A, resulting in beaver dam problems, and the 1972 field grading performed near Site B, created the wetland. Artificial wetlands may be manipulated without creating a conversion affecting eligibility for farm program funds. 7C.F.R.§ 12.5. However, the regulations define "artificial wetland" as "an area that was formerly non-wetland, but now meets wetland criteria due to human activities . . . ." 7 C.F.R. § 12.2(a)(emphasis added). The 1960 soil survey showed the existence of hydric soils in both of the disputed areas and an intermittent stream in both areas. Evidence submitted by Plaintiff from a person who has custom farmed Plaintiff's Nance County farm for 20 years indicates that the area was always wet and difficult to farm, though it became wetter and harder to farm after the canal was constructed in 1985. See text accompanying note 14, infra. Although the beavers and the canal made the area wetter, evidence in the record (fact that Site A was a natural drainage way, hydric soils and the intermittent stream) indicates that the area was "wetland" before the beavers and the canal.[8]

Plaintiff seeks to prove that the wetlands are "artificial wetland" and thus exempt from Swampbuster restrictions. He has the burden of proving that the artificial wetland exemption applies. Downer, 97 F.3d

[8] In addition, the NRCS manuals interpreting the controlling regulations specifically state that beaver activity cannot create an artificial wetland (A.R. at 259-60).

at 1005 (Farmer who asserted that he had not converted wetlands in a manner that violated Swampbuster because the land was "artificial wetland" had the burden of proving the land was "artificial wetland" (citing 7 C.F.R. § 12.5(b)(9), now codified at 7 C.F.R. § 12.5(b)(7)) ("The burden rests with [Plaintiff] not only to establish facts warranting the exemption before the agency, but also to demonstrate to this court where in the record such facts may be found." Id.) Plaintiff asserts that the agency finding that the land had always been wetland is wrong based upon this own observations and affidavits of his neighbors, none of which directly address the question of whether the land was wetland prior to the effective date of Swampbuster. Plaintiff has not carried his burden of proof that the wetland is "artificial wetland."

If the agency had the burden of proving that the two sites were not "artificial wetland" (which it does not), the agency had met the burden. The technical data relied upon by the agency in determining that the land was "farmed wetland pasture" in fact establishes that the land in question was "wetland" prior to the canal, beaver activity and leveling. In Downer, one judge dissented from the majority's finding that the farmer had the burden of proving that the land was "artificial wetland," finding that the agency had the burden of proving that the land was not artificial wetland. In noting that there was no evidence in Downer that the agency had made any findings as to whether the wetland was an artificial wetland, this dissenting judge pointed out the type of evidence that could have supported an expert determination that the wetlands were not artificial (if it had been in the record) – evidence as to soil type or aerial photographs. Downer record lacked this technical data upon which agency experts could have made findings regarding artificial wetland, the record before me regarding the wetlands determination on Plaintiff's land clearly includes the appropriate technical data to support the agency's determination.

C. DUE PROCESS

1. Notice

Of NAD Hearing

By letter dated June 24, 1997, Plaintiff demanded that the hearing before the NAD be held not later than July 7, 1997. The NAD received this letter on June 25, and responded to it on June 26 by rescheduling the hearing to July 1, 1997. Plaintiff got what he asked for–a quick hearing.[9] There were only 12 calendar days between the NAD's receipt of Plaintiff's demand (June 25) and the date by which Plaintiff demanded the hearing take place (July 7). Of these 12 days, four days were weekends and one week day was the Fourth of July holiday. The NAD made a reasonable response to Plaintiff's withdrawal of his earlier waiver and his eleventh-hour demand that a hearing be held no later than July 7. Since Plaintiff requested a hearing that could not possibly have been preceded by 14 days notice even if the NAD had instantly rescheduled it, and the NAD rescheduled the hearing in response to Plaintiff's demand, Plaintiff cannot now complain that he received inadequate notice of the hearing.

That Wetland Determination Had Been Made

Plaintiff's response brief asserts that "[t]he Farm Service Agency never gave the Appellant notification as required by statute, that his farm contained wetland. A determination was made in 1987 from aerial photographs and sent out in some counties but never in Nance County.

[9]Plaintiff objected to the July 1 hearing date, asserting that he had a previous commitment on that date and was available for a hearing only on July 3 or July 7. (A.R. at 319.) Yet Plaintiff did appear at the July 1 hearing and has made no showing that he was prejudiced by the short notice of the hearing date. At the hearing, Plaintiff was asked if he felt he had been able to present the information he needed to give to the hearing officer, and Plaintiff stated that he thought the hearing officer had been very fair and had done a good job in handling the hearing. (T.R. at 140, 147.)

The notification given was done by forcing the Appellant to request that opinion." (P.'s Sept. 14, 1999 Br. (Rev. Copy) at 8.) Nonetheless, Plaintiff did request a wetland determination for Farm No. 1347, Tract 820, on Form NRCS-CPA-38 "Request for Certified Wetland Determination/Delineation" (AR. At 186.) The form stated that the reason for the request for determination was Plaintiff's intention to perform drainage maintenance on land that had been leveled in 1972 and 1978. A wetland determination was made in response to the request, and Plaintiff was notified of this determination by November 7, 1995 letter from William Gilg, Resource Conservationist in the Fullerton Field Office of the NRCS (A.R. at 136-38.) This letter began the long chain of reconsiderations and appeals resulting in the final agency decision now before the court. Plaintiff has cited no authority for the proposition that a wetland notification was required prior to his request for the determination. Due process requires notice before adverse action is taken, so that affected persons have an opportunity to be heard before the action is taken. Plaintiff had prior notice and several opportunities to be heard. Plaintiff has not established a due process violation in connection with the wetlands notification.[10]

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[10]Plaintiff may be confused by a 1990 change regarding wetlands determinations. Prior to 1990, the USDA's policy was to undertake a wetland inventory and notify the affected producers of the wetlands. In Nance County, the inventory was completed, and was transferred to the ASCS's maps. Before notification to producers of the wetlands determinations had gone out, 1990 amendments to Swampbuster were enacted, and the agency was advised not to send any notices of agency-initiated wetlands determinations to producers. (TR at 136:7-24.) After the amendments, rather than initiating a blanket inventory of all farm property in a county to determine the presence of wetlands, the NRCS now makes a determination as to whether wetlands subject to Swampbuster restrictions are present only upon written requet of the producer. (See A.R. at 97, 99 (extracts from 1996 and 1995 National Resources Conservation Service, USDA, National Food Security Act manuals).) Plaintiff may be arguing that any determination by the NRCS prior to 1990 as to whether wetlands were present on Sites A and B is invalid because he did not receive notice or an opportunity to appeal. This ignores the fact that the agency-initiated process of determining whether wetlands were present on Plaintiff's land was not completed prior to 1990, and no adverse action was taken with respect to any such partially-completed, agency-initiated determination.

2. Exclusion of Witnesses

Plaintiff asserts that he was unreasonably prevented from presenting witnesses at the NAD hearing in a manner that violated due process. This contention is without merit. The NAD hearing was held pursuant to the regulations establishing rules of procedure for NAD hearings (7 C.F.R. part 11). There is no prehearing discovery, though the Hearing Officer establishes a reasonable deadline by which the appellant and the agency must submit specified documents. Both the appellant and the agency are required to submit "[a[list of anticipated witnesses and brief descriptions of the evidence such witnesses will offer." 7 C.F.R. § 11.8(c)(2). The regulation governing conduct of the hearing provides that "[t]he Hearing Officer may confine the presentation of facts and evidence to pertinent matters and exclude irrelevant, immaterial, or unduly repetitious evidence, information, or questions," and that "[w]hen appropriate, agency witnesses requested by the appellant will be made available at the hearing." Id. § 11.8(c)(5)(ii). Plaintiff refused to comply with these provisions after being notified of them several times. As a consequence, Plaintiff was not permitted to call witnesses to present live testimony before the NAD Hearing Officer, though he was permitted to supplement the record of the NAD hearing with notarized written statements of several people he had proposed to call as witnesses.

During a May 20, 1997 prehearing telephone conference, there was an extensive discussion of witnesses to be called by the parties. Plaintiff identified only four potential witnesses, all current or former agency employees (Willits, Lassek, Barnes and Gilg). The discussion of identification of potential witnesses took place in the context of the need for the agency to determine whether it objected to the particular agency witnesses Plaintiff sought to call (Prehearing T. at 7, 16-28, 31).

There was no specific discussion of the need to summarize the testimony of proposed witnesses, and if the only notice to Plaintiff regarding required disclosure in connection with witnesses he sought to call had been the prehearing telephone conference, Plaintiff might have a valid due process claim. However, Plaintiff received several later notices of the required prehearing disclosure regarding proposed witnesses.

The notice of hearing mailed May 21, 1997 specifically directed plaintiff to provide a summary of the witnesses he wished to call (A.R. at 351-354) This is the first clear notice to Plaintiff of the witness restrictions. In response, Plaintiff submitted a letter dated may 22, 1997 listing eight current or former agency employees he sought to call as witnesses and nine other proposed witnesses (A.R. at 350). There was no summary of the expected testimony of these seventeen proposed witnesses.

Plaintiff's May 22 letter was sent to Mark Bowen, the State Executive Director of the FSA, who notified Plaintiff by June 4, 1997 letter that the agency did not think seventeen witnesses were necessary, and noted that at the prehearing conference Plaintiff had identified a total of four potential witnesses (A.R. at 349).[11] This letter from Bowen noted that the State NRCS office had identified four agency employees who would be witnesses for the agency (Rasmussen, Jasmer, Gilg and Huntwork) and that the agency would not object if the agency's witnesses also testified for Plaintiff.[12] Bowen's letter also contained the

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[11]This is significant because the Hearing Officer who conducted the prehearing conference would not have been too concerned about hearing repetitive testimony if Plaintiff called only four witnesses. There is a much greater likelihood that the testimony of proposed witnesses would be repetitive if there are seventeen witness than four witnesses.

[12]Three of the agency employees listed by the agency as witnesses for the agency were also identified by Plaintiff as potential witnesses for Plaintiff (Rasmussen, Jasmer, and Gilg) in Plaintiff's May 22 letter.

statement that any witnesses called, whether or not agency employees, would have to have knowledge of information that was not available from other sources. This is the second clear notice to Plaintiff of the witness restrictions.

Plaintiff sent a letter dated June 7, 1997 to Hearing Officer Handley asking Handly to "please indicate to me what you wish for documentation" (A.R. at 347), despite the fact that he ahd been clearly directed, at least twice, to submit a summary of the expected testimony of his proposed witnesses. Hearing Officer Handley responded to Plaintiff's query by June 13, 1997 letter (A.R. at 345-46). Handley's letter advised Plaintiff to review the Notice of Hearing, as it listed the reuired documentation (and the Notice of Hearing clearly called for a summary of the testimony of proposed witnesses). Handley's letter also made it clear that Plaintiff could not call any person as a witness unless that proposed witness possessed information that was pertinent and necessary, and could not be obtained except through the testimony of the proposed witness. The letter also stated that the Hearing Officer could exclude from the record evidence that was irrelevant, immaterial, or unduly repetitious. This was the third clear notice to Plaintiff of the witness restrictions.

On June 14 and 15, Plaintiff sent letters to Bowen and Handley flatly stating that he would not change his witness list or summarize the expected testimony of his proposed witnesses (A.R. at 343, 342). In a June 18 letter to Hearing Officer Handley Plaintiff stated that if all agency witnesses he had previously requested were not present at the hearing (then scheduled to be June 23, 1997) he would request that the hearing be recessed (A.R. at 341).

Ann Gilbert, the Acting Assistant Director of NAD, then sent Plaintiff a letter dated June 18, 1997–the fourth clear notice to Plaintiff of the witness restrictions (A.R. at 339-40). Gilbert's letter recited that Plaintiff had been provided a copy of the NAD regulations and summarized the regulations regarding witnesses, particularly 7 C.F.R.

§§ 11.8(c)(5). The letter explained that the Hearing Officer could not determine whether witnesses should be required to appear without a brief description of the evidence Plaintiff's proposed witnesses would offer, and that the hearing then scheduled for June 23, 1997 was postponed "until the witness information is provided to the Hearing Officer." (Id.)

Plaintiff responded with a letter to Gilbert and Handley, again refusing to specify the expected testimony of proposed witnesses, making the blanket statement that "all witnesses have been involved with or have knowledge of the area in question which is the basis of this hearing through either private or governmental contact," and asserting that the witnesses would be objective and uncoached (A.R. at 336). This did not solve the Hearing Officer's problem–the Hearing Officer had an obligation to exclude irrelevant, immaterial, or unduly repetitious evidence, and to require agency employees to be made available to Plaintiff as witnesses at the hearing only if appropriate. See 7 C.F.R. § 11.8(c)(5)(ii). The Hearing Officer could not make the necessary determinations without a summary of the expected testimony to be elicited from Plaintiff's seventeen proposed witnesses.

Plaintiff had abundant notice of the witness restrictions and chose not to submit a summary of the expected testimony of his proposed witnesses. As a consequence, he was not permitted to call his witnesses to testify at the hearing. However, he was permitted to call as his own witness three of the four agency witnesses. The Hearing Officer's decision not to allow Plaintiff to call other witnesses was not a due process violation, particularly in light of the fact that Plaintiff was permitted to supplement the violation, particularly in light of the fact that Plaintiff was permitted to supplement the record after the hearing, and chose to submit verified written statements of only some of the persons he had identified as his seventeen proposed witnesses (Fred Whitney, "Bud" Santin, Frank Santin, Jr., John Santin, and Dale Lesiak) (A.R. at 267-84). If Plaintiff wanted testimony of his other proposed witnesses to be part of the record, he could have supplemented the record with notarized written statements from those witnesses. He

chose not to. Plaintiff has made no showing that alleged irregularities in the hearing prejudiced him, and in fact stated at the hearing that he thought the hearing had been fair.[13] Plaintiff may not like the procedural rules governing appeal hearings before the NAD, but the actions by the Hearing Officer regarding Plaintiff's proposed witnesses did not violate due process.

3. Hearing Before NAD

Plaintiff has alleged several improprieties in the hearing before NAD. I will briefly address those allegations to explain my finding that Plaintiff has not proven any improprieties, and that there were no due process violation in the conduct of the hearing.

Reliance on Allegedly False Statement

A July 11, 1997 letter from Gerald Jasmer (state wildlife biologist with the NRCS) to Darlene Wyrick of FSA was submitted by the agency to supplemrent the record of the NAD hearing (A.R. at 25). Plaintiff asserts that a sentence in Jasmer's letter[14] mischaracterized the written statement of "Bud" Santin (submitted by Plaintiff to supplement the record (A.R. at 276-77 and 281), and asserts that since the NAD wrongly refused to allow Mr. Santin to testify, "Mr. Jasmer's statement could not be identified as a blatant lie. . . ." (P.'s Sept. 14, 1999 Br. (Rev. Copy) at 12.) I have already explained that the NAD Hearing

[13] At the end of the hearing, Plaintiff was asked by the Hearing officer if he felt he had been able to present the information he needed to give. In response, Plaintiff stated "Yes, in fact I think you've been very fair in this hearing." (TR. At 140:14-15.) As the hearing was closing, Plaintiff was asked if he had other questions and he stated in response: "Just I want to say one thing. I think you did a very good job in handling the hearing." (TR. At 147:4-5)

[14] "Mr. Prokop's assertion that the area was 'formerly non-wetland' is not correct according to our information and was even born [sic] out in one of the witness letters that the area was 'always wet." (A.R. at 25)

Officer's decision not to allow Plaintiff's proposed witnesses to testify did not violate due process. That leaves Plaintiff's allegation that Jasmer's statement was false, and that reliance by the NAD Hearing Officer and NAD Director on this false statement violated due process.

"Bud" Santin's written statement provides as follows:

> I have custom farmed Robert Prokop's 130 acres on which the Wetlands Determination has been made. [sic] for 20 years. The Southeast corner which contains a dry creek channel which courses through the property, has always been wet and difficult to farm because of standing water after drainage from Fred Whitney's farm which drains the Northern Sections of land toward to [sic] Loup River and enters Prokop's property through a large culvert under the gravel road. The serious difficulty in farming this area started about ten years ago.
>
> . . . [discussion of the beaver dam in the canal and resulting problems]
>
> . . . The cattails and other vegetation on the bank started about ten years ago when the beavers had dammed the canal on Frank Santin's property. . . .
>
> Since Robert Prokop dredged out the river creek channel, the wetness problem that was present in the farming operation has markedly decreased . . .
>
> With adequate drainage, there would be no water standing in the dry creek bed and the wet saturated soil that has been a problem in the immediate area of the dry creek bed would be dried up allowing easier farming processes and operation.

(A.R. at 267-77) (emphasis added). Plaintiff asserts that the "always wet and difficult to farm" statement is totally qualified by the statement that "[t]he serious difficulty in farming this area started abut ten years ago." In other words, Plaintiff asserts that the two highlighted phrases mean that the area became wet and difficult to farm only 10 years ago, when the beaver activity started. However, it is equally plausible to conclude that in fact the area has "always" been wet, but that the wetness was not a serious problem until compounded by the beaver activity. Other parts of the record support the latter interpretation–that used by Jasmer in his letter. See, e.g., A.R. at 267, 269, 276 (Site A is natural drainage way carrying precipitation and snow melt), 209, 215 (Site A and Site B both have hydric soil); TR. at 91-93 (intermittent stream and natural wetland have existed on Site B since at least the 1960's). In summary, Jasmer's statement was not false. Reliance upon this statement by the NAD Hearing Officer and Director did not constitute a due process violation.

Alleged improper influence by State FSA Director

Plaintiff asserts that Bowen, the State FSA Director, improperly influenced appeals of the wetlands determination. This assertion is apparently connected to Plaintiff's misunderstanding of the process used by the Hearing Officer to determine whether proposed witnesses at the hearing have relevant information not available from other sources that is not unduly repetitious, and whether it is appropriate for agency employees to be made available to Plaintiff as witnesses at the hearing. The assertion that Bowen improperly influenced appeals of the wetlands determination is without merit.

In response to the notice of the NAD hearing mailed May 21, 1997 (A.R. at 351-54) Plaintiff submitted a letter dated May 22, 1997 listing a total of seventeen witnesses he proposed to call (A.R. at 350), despite the fact that in a prehearing telephone conference call he had identified only four potential witnesses. Plaintiff's May 22 letter did not summarize the expected testimony of these seventeen proposed

witnesses. Plaintiff's letter was sent to mark Bowen, the State Executive Director of the FSA. Bowen notified Plaintiff by June 4, 1997 letter that the agency did not think seventeen witnesses were necessary (AR. At 349). Bowen's letter to Plaintiff noted that the state NRCS office had identified four agency employees who would be witnesses for the agency (Rasmussen, Jasmer, Gilg, and Huntwork) and that the agency would not object if its witnesses also testified for Plaintiff. (Plaintiff's May 22 letter listed eight current or former agency employees as potential witnesses, including Rasmussen, Jasmer, and Gilg.)

Regulations governing NAD hearings provide that during the time between the filing of an appeal and the issuance of a final determination by the NAD, no "officer or employee of the Division [shall] engage in *ex parte* communication regarding the merits of the appeal with any person having any interest in the appeal pending before the Division, including any person in an advocacy or investigative capacity." 7 C.F.R. § 11.7(a)(1). The regulations further provide that this prohibition does not apply to "[d]iscussions of procedural matters related to an appeal." Id. § 11.7(a)(1)(I). This ban on ex parte communication does not apply to the NAD's determination to give Bowen a copy of Plaintiff's May 22 letter listing potential witnesses, as discussion of witnesses under these circumstances was a discussion of procedural matters related to an appeal. This is particularly true in light of the fact that the Hearing Officer of the NAD may issue a subpoena for a witness only if the party proposing to call the witness

> has established that either a representative of the Department or a private individual possesses information that is pertinent and necessary for disclosure of all relevant facts which could impact the final determination, that the information cannot be obtained except through testimony of the person, and that the testimony cannot be obtained absent issuance of a subpoena.

7 C.F.R. §m11.8(a)(2)(iii)(B). Furthermore, whether or not the testimony can be obtained without a subpoena, "the Hearing Officer may confine the presentation of facts and evidence to pertinent matters and exclude irrelevant, immaterial, or unduly repetitious evidence, information, or questions. . . When appropriate, agency witnesses requested by the appellant will be made available at the hearing." Id. § 11.8(c)(4)(ii). The decision to exclude Plaintiff's proposed witnesses was made by the Hearing Officer, albeit after input from Bowen.

Hearing Officer's Failure to Provide Pretrial Transcript

Plaintiff asserts that "[i]n a portion of the manuel [sic] not included in the Administrative Record, there is a provision that the Hearing Officer will provide the Plaintiff/Appellant a pre-trial transcript before continuing his determination." P.'s Pretrial Br. At 10. Plaintiff does not provide a copy of or a specific citation to this alleged requirement, and the proceeding before the NAD Hearing Officer is an appeal of an agency decision and not a trial, so it is difficult to determine what Plaintiff refers to. The regulations do provide that "[t]he Director, the Hearing Officer, and the appellant shall have access to the agency record of any adverse decision appealed to the Division for a hearing. Upon request, the agency shall provide the appellant a copy of the agency record." 7 C.F.R. § 11.8(a)(1)(emphasis added). However, Plaintiff has provided no evidence to indicate that he requested and was not provided a copy of the agency record.

Field Visits Were Shams Because Agency Employees Did Not Carry Agency Manual, Rules and Regulations With Them on Visit

Plaintiff asserts that all investigative teams on field visit must carry the agency manuals, rules and regulations with them on the field visit. He alleges that the agency employees making field visits to his farm did not carry this material with them, and the fact that they did not indicates that the field visits were shams, intended to provide documentation of the agency's predetermined conclusion that the sites

in question were wetland. Plaintiff cites no law in support this assertion, and it is without merit.

Incompleteness of Agency record

Plaintiff asserts that the agency record is incomplete, arguing that several necessary letters and other information he deems material are not in the record. Plaintiff mischaracterizes the nature of this judicial review of the final agency decision. This court's sole task is to determine whether the existing record supports the determination of the agency. If it does, then it is irrelevant that Plaintiff wishes that additional data was in the record. If Plaintiff considered the NAD hearing record to be incomplete, he should have supplemented the record by providing any missing information when the Hearing Officer gave him the opportunity to supplement the record. Since he did not, Plaintiff's only other recourse is to argue that the cannot support the final agency decision. Plaintiff has lost that argument.

D. DAMAGES

Plaintiff's Pre-Trial Brief continues to assert his request for an award of consequential damages resulting from the agency's action. Jurisdiction in this case is based on 28 U.S.C. § 1346 and the Administrative Procedures Act, 5 U.S.C. §§ 701, et seq. (Filing 1, Complaint ¶3). However, this court is without jurisdiction to award damages in this case.

Absent a waiver of sovereign immunity, this court is without jurisdiction to award monetary relief against the United States. McBride v. Coleman, 955 F.2d 571, 576 (8th Cr. 1992), cert. denied, 506 U.S. 819 (1992). See also United States v. Mitchell, 463 U.S. 206, 212 (1983). There is no waiver of sovereign immunity in 28 U.S.C. § 1346 702 expressly limits review under the Administrative Procedures Act to actions "seeking relief other than money damages."

A party may obtain monetary relief under the APA only where

the judgment represents benefits or payments withheld as part of the agency determination, rather than consequential damages resulting from the agency action. Bowen v. Massachusetts, U.S. 879, 893 (1988) (federal agency administered medicaid grant program and state sought payment by federal agency of grant moneys it had been deprived of rather than monetary compensation for a wrong suffered: money damages limitation in § 702 did not bar the state's suit because the state sought declaratory and injunctive relief and the monetary aspects of the relief sought were not "money damages" within the meaning of § 702). See also, Maryland Dep't. of Human Resources v. Department of Health and Human Serv., 763 F.2d 1441, 1446 (D.C. Cir. 1985); Esch v. Yeutter, 876 F.2d 976, 981 (D.C. Cir. 1989).

In this case, the agency determination did not result in the withholding of any program payments due to Plaintiff. This case began when Plaintiff sought permission to clean out a canal on property abutting Plaintiff's farm, and the agency granted Plaintiff permission to clean out the canal. This court is without jurisdiction to award consequential money damages in this action.

III. CONCLUSION

The case before this court is the sixth review of the determination that Sites A and B are wetlands subject to Swampbuster restrictions. In the course of this review and appeal process, there were two separate field visits by agency employees (with different agency employees on each visit). Plaintiff has exhausted all administrative remedies by appealing the determination through all agency channels. He has received the full measure of due process to which he was entitled and has been granted permission to take the action affecting his property which he sought to take–he has received permission to clean out the canal on his neighbor's property despite the fact that this action would affect the "farmed wetland pasture" identified on Plaintiff's land. The agency has even invited Plaintiff to request another determination if Sites A and B dry up significantly after regular maintenance of the

canal. I find that there has been no abuse of discretion by the NAD director in upholding the determination that Sites A and B are farmed wetland pasture within the meaning of 16 U.S.C. §§ 3821-23.

IT IS ORDERED that the determination that the land is farmed wetland pasture is affirmed. Judgment for Defendant will be entered by separate order.

DATED this 29th day of March, 2000.

BY THE COURT:

"s/ Richard G. Kopf"
Richard G. Kopf
United States District Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-2754

Filed - 4:96cv 3034
U.S. District Court
District of Nebraska
99June21am8:52
Gary D. McFarland, Clerk

Keith Barthel; Dorothy Barthel, *

Appellants, *

v. *

United States Department of Agriculture, Daniel Glickman, Secretary, *

Appellee. *

Appeal from the United States District Court for the District of Nebraska

Submitted:January 21, 1999

Filed: June 18, 1999

Before McMILLIAN, BEAM, and LOKEN, Circuit Judges.

BEAM, Circuit Judge.

Keith and Dorothy Barthel (the Barthels) appeal the district court's decision upholding the United States Department of Agriculture's

(USDA) limitation on the dredging of a drainage ditch..

' The limitation leaves the Barthels' hay meadow flooded. We reverse and remand

1. BACKGROUND

In 1916, the South Fork of the Elkhorn river was straightened to improve drainage. The straightened portion, referred to as "the ditch," allowed certain land to be used for hay and pasture. The ditch was dredged in 1951 to clean out obstructions and silting which had occurred through the passage of time and caused water to backup. In 1957, the Barthels purchased their 450-acre hay meadow. The meadow is drained by the ditch which runs along the south side of the Barthels' property. The ditch also runs on adjacent property owned by Gene and Erna Liermann. The Liermanns' land is directly downstream from the Barthels' tract.

The Barthels, together with a neighbor, dredged the ditch again in 1983. The Liermanns gave permission for this work to be done to the portion of the ditch on their land as well. The following year the county replaced a culvert under a county road where it crosses over the ditch. Road department workers testified that sometime in 1986, the culvert was lowered by approximately eighteen inches. In the interim period, on December 23, 1985, the Food Security Act (the Act) became effective. The Act contains federal Swampbuster provisions aimed at preserving wetlands. See Gunn v. USDA., 118 F.3d 1233, 1235 (8th Cir. 1997), cert. denied, 118 S. Ct. 1042 (1998).

By 1987, the ditch had again become obstructed with debris and clutter, allegedly caused by the Liermanns' cattle crossing the ditch. The Barthels sought to dredge the ditch on the Liermanns' property or in the alternative have the Liermanns clean that portion pursuant to their state

law obligations. This time the Liermanns refused, and eventually the Barthels filed suit in Nebraska state court. A mandatory injunction was issued requiring the Liermanns to clean out the portion of the ditch on their property "so that water will flow." Admin. R. at 327 (state court injunction).

[1] The Barthels also filed a motion asking that we consider certain color photographs. We ordered the motion taken with the case, and now deny the request. The administrative record contains several adequate representations and other supporting photographs.

Because cleaning and maintenance of the ditch impacted a potential wetland area, the USDA,[2] the agency responsible for enforcement of the Swampbuster provisions, became involved. Initially, the USDA determined that the cleaning and maintenance required by the state court did not violate any Swampbuster provisions However, after the Liermanns appealed, the USDA reversed course. Based upon reliable evidence that the culvert was lowered eighteen inches in 1986, the USDA determined the grade and depth of the ditch required under the Swampbuster provisions and implementing regulations, and refused to allow dredging that exceeded eighteen inches above the bottom of the downstream culvert. At that level and grade, the Barthels' hay meadow is flooded.

Following exhaustion of administrative appeals, the Barthels brought suit in federal district court. The district court affirmed the USDA's decision, and the Barthels appeal. The Barthels argue that the agency interpretation of the federal statute is incorrect. They contend that although they were able to produce hay, and pasture their milk cows on the land before December 23, 1985, the agency's determination has left their land completely and permanently underwater.[3]

II. DISCUSSION

"In order to combat the disappearance of wetlands through their conversion into crop lands, Congress passed a law known commonly as

'Swampbuster.'" Gunn, 118 F.3d at 1235 (citing Food Security Act of 1985 §§ 110 1, 1221-23, 16 U.S.C. §§ 3801, 3821-24). The law denies eligibility for several federal farm-assistance programs if

[2]This function is delegated to the Soil Conservation Service (SCS) which has been replaced by the National Resource Conservation Service (NRCS). 7 U.S.C. § 6962. For simplicity, the SCS or NRCS will be referred to as "the agency" or the USDA.

[3]The Barthels also question several procedural deficiencies. In light of our conclusion, we need not address these issues.

wetlands are converted to agricultural use. See National Wildlife Fed'n v. Agricultural Stabilization and Conservation Serv., 955 F.2d 1 199, 1200 (8th Cir. 1992).[4] In addition, the law provides for exemptions, namely wetlands that were converted before December 23, 1985-the effective date of the law.[5] See Gunn, 118 F.3d at 123 5. Land meeting this exemption can be maintained as it was prior to the effective date of the Act without loss of federal benefits. Neither the Barthels nor the USDA dispute that the land in question here, a 450-acre hay meadow, was altered by the ditch and drained prior to the effective date of the Act. See Barthel v. Glickman, No. 4: 96CV3034, mem. op. at 7 (D. Neb. May 1, 1998). The only dispute is the extent to which the land was altered and can now be maintained. The Barthels contend that the land was previously used for hay production and pasture and should be maintained at the level of prior use. The USDA argues that the current level of the ditch should be maintained, whatever the effect upon the property.

[4]The statute provides in pertinent part:

> (6)(A) The term 'converted wetland' means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural

commodity possible if-

(i) such production would not have been possible but for such action; and

(ii) before such action-

(I) such land was wetland; and

(II) such land was neither highly erodible land nor highly erodible cropland.

(B) Wetland shall not be considered converted wetland if production of an agricultural commodity on such land during a crop year-

(i) is possible as a result of a natural condition, such as drought; and

(ii) is not assisted by an action of the producer that destroys natural wetland characteristics.

16 U.S.C. § 3801.

(a) Production on converted wetland

Except as provided in this subchapter and notwithstanding any other provision of law, any person who in any crop year produces an agricultural commodity on converted wetlands as determined by the

The regulations implementing the Swampbuster provisions classify the Barthels' land as "other wetland area" because it is seasonally flooded or ponded but was "manipulated prior to December 23, 1985." 7 C.F.R. § 12-32(a)(3) (1992). "Persons may continue to farm such wetlands ... as they did prior to December 23, 1985. However, no action can be taken to *increase effects* on the water regime beyond that which existed on such lands" on or before that date. Id. § 12.33(a) (I 992) (emphasis added).

As noted, the Barthels had manipulated the water regime on their land before the effective date of the Act by improving drainage. The record provides uncontroverted examples of this. When the time came to clean the drainage ditch, the USDA denied permission despite a state mandatory injunction. The agency denied permission based upon the National Food Security Act Manual (the Manual), which more specifically defines the technical application of the Swampbuster provisions. See id. § 12.6(c).

The Manual classifies the Barthels'land as "farmed wetland pasture or hayland." See NFSAM § 514.23.[6] For farmed wetlands the Manual provides that the land can be used as it was before December 23, 1985, including "managed for pasture or hayland and the drainage or other hydrologic manipulations can be maintained, but not improved." Id. § 514.23(d). The Manual goes on to state that a

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Secretary, shall be-

(1) in violation of this section; and

(2) ineligible for loans or payments in an amount determined by the Secretary to be proportionate to the severity of the violation

Id. § 3821 (a).

[5]The law provides that:

(b) Exemptions
No person shall become ineligible under section 3821 of this title for program loans or payments under the following circumstances:

(A) A converted wetland if the conversion of the wetland was commenced before December 23, 1985.

Id. § 3822(b).

hydrologic manipulation can be maintained to the same "scope and effect" as before December 23, 1985. Id. § 515.10(a). The Manual concludes that the agency "will determine the scope and effect of original manipulation on all farmed wetlands." Id. § 515.1 1 (b).

To determine the original scope and effect of the manipulation, the USDA focused solely on the depth of the ditch that drains the hay meadow. In essence, the USDA interprets the manipulation to be the ditch. This led all involved to drudge through the mud of determining its precise depth. The agency argues, with supporting evidence, that the level of the culvert on or before December 23, 1985, was eighteen inches higher than its current level and as a result the ditch can only be maintained at that level. Unfortunately, this results in flooding on the Barthels' land. The Barthels challenge the agency's interpretation of the Swampbuster provisions and argue that maintenance of the

manipulation should allow them to use the land as they did prior to the passage of the Act.

"We must uphold the [agency's] decision unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Von Eye v. United States, 92 F.3d 681, 685 (8th Cir. 1996) (quoting 5 U.S.C. § 706(2)(A)). -,Yet, an "overreaching and erroneous interpretation of the statute" cannot be in "accordance with law." Downer v. United States, 97 F.3d 999, 1010 (8th Cir. 1996) (Beam, J., concurring and dissenting). Certainly there is no worse statute than one misunderstood by those who interpret it. We conclude that the agency's interpretation misses the clear focus of the Swampbuster provisions and the implementing regulations.

The Act's proclaimed purpose is to preserve wetlands, or, if wetlands are altered, to preserve the conditions as altered. The Act says nothing about preserving the precise depth of drainage ditches or culverts. The government emphasizes that "'[w]etlands are a priceless resource whose contributions have long gone unrecognized.'"

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[6]The Manual provides that "[f]armed wetland pasture or hayland (FWP) are wetlands that: were manipulated and used for pasture or hayland prior to December 23 1985, still meet wetland criteria, and are not abandoned." NFSAM § 514.23(a).

Appellee's Brief at 12 (quoting H.R. Rep. No. 99-271, pt. 1, at 87 (I 985), reprinted in 1985 U.S.C.C.A.N. 1103, 1190). However, a drainage ditch is not the envisioned protected area. The agency's implementing regulations also focus on the wetlands. Under the regulations, farming of a wetland should be maintained at the level that was achieved prior to the Act. The "water regime" is maintained, not necessarily the ditch and culvert levels. See, e.g., Gunn, 118 F.3d at 1235 (focusing on the notion that a person cannot "improve the land's drainage"). As further evidence of this point, the current regulation on "use of wetland and converted wetland" provides that changes in the watershed due to

human activity which increases the water regime on a person's land, can result in a person being allowed "to adjust the existing drainage system to accommodate the increased water regime." 7 C.F.R. § 12.33(a).

This is not to say that the level of a ditch or culvert cannot provide an accurate indication of the water regime which previously existed. In fact, the Manual states that "any other available information relating to systems installed before 12/23/85" can be applicable in determining the "original scope and effect" of a wetland manipulation. NFSAM § 515.1 1 (e). In the Barthels' case, the USDA's findings for the ditch and culvert depths apparently conflict with the water regime that existed prior to December 23, 1985. In such a conflict, the government's position is that the level of the ditch should win, at the expense of the prior conditions of the land. In short, the means are more important than the ends. We disagree. The unambiguous focus of the statute and implementing regulations is to maintain the status quo of the manipulated wetlands-not the drainage ditch. And a technical determination that establishes the level of a culvert in a ditch, but which produces a result contrary to the previous status quo of the wetlands cannot stand.[7] The statute and regulations mandate that the Barthels should be able to have the water and farming regime they had before December 23, 1985.

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[7]An expert should calculate the dredging necessary to allow the Barthels to have the same use of their land as they did previously. This does not mean that the Barthels get the same use of their land no matter the circumstances. For example, if there is high water from unusual amounts of rain, the Barthels cannot automatically dig the ditch deeper. They cannot exceed the original "scope and effect." Illustrative of this point is Keith Barthel's testimony that "traditionally in the spring the ditch would

The burden is on the government to show that the proposed maintenance, in this case cleaning the ditch so that the hay meadow is not underwater, exceeds the scope and effect of the original manipulation. Cf. Downer, 97 F.3d at 1009 (Beam, J., concurring and dissenting) (stating that it is the burden of the agency to-prove ineligibility for benefits). However, this does not give the agency the right to arbitrarily define what the original scope and effect was. Is it arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law for the agency to pick an original manipulation regardless of how it affects the use of the land?

We are presented with a factual setting that is cyclical. The record shows that the ditch is continually silted-in by natural conditions and animal traffic and must be periodically cleaned out. If we accept the government s argument, the USDA could select a level for the original manipulation, either intentionally or unintentionally, which is at the end of the natural cycle-just before the periodic clean-up. This would essentially redefine the cycle. Thus, in the government's view, if partial flooding occurred just before the clean-up, the flood level would be the *best* the Barthels could expect for use of their land. An ipse dixit determination like this would drastically reduce the use of the land and even leave it underwater-reviving a wetland. Cf. Von Eye, 92 F.3d at 685 (concluding that the agency did not arbitrarily deny an exemption to the Swampbuster provisions and even allowed "the advantages of an exemption longer than strictly provided for by the statute and regulations"). This interpretation conflicts with the Act considered as a whole.

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be frozen for a time and that 100 to 150 acres would flood until the ditch thawed. He also testified that the reed canary grass could survive this 3- to 4-week flood condition and, by June, could provide sufficient palatable food to feed all his cattle." Barthel v. Liermann, 509 N.W.2d 660, 663 (Neb. Ct. App. 1993).

[3]It was the Liermanns' "belief that the dredging of the ditch in 1983 made the ditch deeper than it originally had been." Barthel, 509 N.W.2d at 663. At oral argument, counsel for the government did concede that the Barthels are entitled to the best drainage of their land, on or before December 23, 1985, that they can prove with reliable evidence.

III. CONCLUSION

Under the federal Swampbuster provisions and the implementing regulations, the Barthels are entitled to farm their land as

they did on or before December 23,1985, so long as the previously accomplished drainage or manipulation is not significantly improved upon, so that *wetland characteristics are further* degraded in a significant way." Gunn, 118 F.3d at 1238 (emphasis added). We therefore reverse and remand this matter to the district court with instructions that the case be remanded to the agency for a hearing and determination of the wetland characteristics and associated use of the Barthels' 450-acre hay meadow, prior to December 23, 1985, and the necessary dredging and cleaning of the ditch to accomplish that water and fanning regime.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DEPARTMENT OF AGRICULTURE
NATIONAL APPEALS DIVISION
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

DIRECTOR REVIEW DETERMINATION

In the matter of	)	
	)	
Robert Prokop NAD	)	Log No. 9700073 1 W
and	)	
Farm Service Agency	)	

STATEMENT OF THE CASE

This is a review of a National Appeals Division (NAD) Hearing Officer determination issued July 22, 1997, that upheld the Farm Service Agency (Agency) designation of 8.0 acres of Farm Serial Number (FSN) 1347, Tract 820, Fields 1, 2, and 3 as Farmed Wetland.

The Hearing Officer determined that the Agency decision was not erroneous.

The Appellant submitted a written request for review on August 7, 1997.

Upon consideration of the case record, the request for review, the laws applicable to the matter at issue, and applicable regulations as defined at 7 U.S.C. 6998(c), the following determinations are made.

EVIDENCE

The Hearing Officer's findings of fact (FOF) are supported by substantial evidence as follows:

1. Soil mapping was conducted by the Soil Conservation Service (SCS) in 1955, covering an area which included the Appellant's FSN 1347. In 1960 a soil survey was issued by the SCS, all of the land areas in dispute in fields 1, 2, and 3 are shown on that soil map to be soil type Cs. Soil type Cs is identified as Cass Fine Sand Loam, having soils with a water table of 0-1 foot and having hydric soils as inclusions within it. (FOF 2.)

2. The Appellant began irrigating the land north of field 2 in 1972. Over the next year or two, the Appellant graded that land so it sloped consistently from north to south and drained into field 2 and part of field 1. The natural drainage in field 2 was then enhanced to remove water from the area. (FOF 3.)

3. Prior to 1985, the areas in dispute were wet and difficult to farm. In 1995, Frank Santin, who owns property adjacent to the Appellant, constructed a canal on his property. The canal altered the naturally occurring watershed which flowed from the Appellant's property through Mr. Santin's property. After the canal was constructed, beaver inhabited the canal and dammed it up, causing water to back up into field 3 of the Appellant's fan-n. Over the next several years, the darn was tom out at least three times, only to be reconstructed. In 1995 the dam was removed. (FOFs 4 and 5.)

4. On August 6, 1995, the Appellant informed the Agency that he was going to clean out a portion of the ditch which is in field 3. The Appellant was notified on November 7, 1995, that the work he wanted to do was in a wetland. (FOF 6.)

CONCLUSIONS

The Hearing Officer's determination is consistent with the laws and regulations of the Agency and the generally applicable interpretation of such laws and regulations as follows:

1. The controlling regulations in this matter are cited at 7 CFR Part § 12. Regulations at 7 CFR 12.2 (4) define the characteristics of a fanned wetland pasture as wetland that was manipulated and managed for pasture or hayland prior to December 23, 1985, and on December 23, 1985, met the hydrologic criteria for being a wetland. This regulation also defines an artificial wetland as being an area that was formerly non-wetland, but now meets wetland criteria due to human activities, such as, a wetland that is temporarily or incidentally created as a result of adjacent development activity. The Appellant and Agency agree that the land in dispute currently meets the criteria for being a wetland, but disagree on how the land came to be wetland. The Agency has taken the position that land is a naturally occurring farmed wetland pasture, while the Appellant contends that the land is an artificial wetland. The soil maps issued in 1960 show that the land was wetland in 1960. The land became a serious wetland problem about ten years ago, but that it was difficult to farm due to standing water prior to that time. Substantial evidence of record supports the Hearing Officer's determination that the 8.0 acres in question are fanned wetland pastures.

2. The Hearing Officer conducted an evidentiary hearing in accordance with 7 U.S.C. §6997.

3. The statute, at 7 U.S.C.§ 6997(c)(4), provides, "The appellant shall bear the burden of proving that the adverse decision of the agency was erroneous." The Appellant failed to prove by a preponderance of the evidence that the Agency's decision to

designate 8.0 acres of Tract 820 as fanned wetland was erroneous.

DETERMINATION

1. The Hearing Officer's determination is upheld.

2. This concludes the administrative appeal of this case.

"s/ Norman G. Cooper" 9/22/97
NORMAN G. COOPER, Director Date

UNITED STATES DEPARTMENT OF AGRICULTURE
NATIONAL APPEALS DIVISION

In the matter of	)	
	)	
ROBERT J. PROKOP	)	CASE No. 97000731 W
AND	)	
FARM SERVICE AGENCY	)	

DETERMINATION OF APPELLANT'S REQUEST FOR DIRECTOR'S REVIEW

A request for a Director's review has been received in the above entitled matter. The review was requested by the Appellant, and is subject to a determination of completeness pursuant to Title 7 of the Code of Federal Regulations (7 CFR) Part I 1.9(a). The following facts, conclusions and determinations are made:

FACTS:

1. A Hearing Officer from the National Appeals Division (Division) issued a determination on July 22, 1997.

2. A copy of that determination was mailed postage paid to the Appellant on the date of issue.

3. The Appellant submitted a written request for review on August 1, 1997. The request for review was postmarked, August 1, 1997.

4. The Appellant did not *personally sign* the request for a review of the Hearing Officer's decision, by the Director of the

National Appeals Division.

CONCLUSIONS:

1. 7 CFR Part 1 1.9(a) establishes that a review of the determination of a Hearing Officer *must be personally signed* by the Appellant, contain specific reasons as to why the determination is wrong, and a copy of the request for review must be provided to the Agency at the same time it is submitted to the National Appeals Division.

2. The Appellant failed to personally sign a review request of the Hearing Officer's determination by the Director of the National Appeals Division.

DETERMINATION:

1. The Appellant's request for review of the Hearing Officer's determination by the Director of the Division is denied pending receipt of a timely signed review request, which must be postmarked within thirty (30) days of when the Appellant received the determination from the Hearing Officer.

2. This is a final decision and is not appealable.

Dated this 5th day of August, 1997.

"s/MARK S. ALCORN"
MARK S. ALCORN
Acting Assistant Director
National Appeals Division

Copies of this Determination mailed postage paid to:

DIRECTOR, NAD
APPELLANT:
Robert J. Prokop
P.O. Box 14
Wilber, NE 68465-0014

AGENCY STATE OFFICE:
Farm Service Agency, NE, Attn.: Appeals Coordinator

AGENCY DECISION MAKER/REPRESENTATIVE:
Farm Service Agency
P.O. Box 57975
Lincoln, NE 68505-7975

UNITED STATES DEPARTMENT OF AGRICULTURE
NATIONAL APPEALS DIVISION

In the matter of	)	
	)	
Robert Prokop	)	NAD Log No. 97000731W
and	)	
Farm Service Agency	)	

APPEAL DETERMINATION

On May 20, 1997, the above-entitled matter was subject to a preheating teleconference. Attending the teleconference were Paul R. Handley, Jr. of the National Appeals Division (Division); appellant Robert Prokop, and Darlene Wyrick, who represented the decision maker. On May 27, 1997, the appellant waived his right to have his hearing conducted within 45 days of the time the request was received by the National Appeals Division. On June 24, 1997, the appellant notified the Division he was withdrawing his waiver and demanded that his heating be held no later than July 7, 1997. Because Hearing Officer Handley's schedule would not allow him to conduct the hearing within that time frame, the case was reassigned to a new Hearing Officer. On July 1, 1997, the above-entitled matter was subject to an appeal hearing in Omaha, Nebraska. Attending the appeal hearing were Jack L-Richardson, Hearing Officer of the Division; appellant Robert Prokop; witnesses G. James Huntwork, William R. Gilg, Gerald E. Jasmer, and Lyle D. Rasmussen, all of the Natural Resource Conservation Service (NRCS); and Darlene Wyrick, who represented the decision maker for Farm Service Agency (FSA). The NRCS is an agency previously known as the Soil Conservation Service (SCS). The Hearing Officer has been assigned this appeal in accordance with the provisions of Title 7 of the Code of Federal Regulations (7 CFR) 11.8.

The matter on appeal concerns the FSA decision that portions of Farm Serial Number (FSN) 1347, Tract 820, located in Fields 1, 2, and 3, contain approximately 8 acres of wetlands This decision was given to the appellant in a notice dated April 10, 1997, and signed by Bruce C. Coffey, County Executive Director for the Nance County FSA office. The reasons given to the appellant for this decision are that the decision was made in accordance with the guidelines in the FSA office and the NRCS office at the time the decision was made. It is FSA's position that the decision is supported by the documentation completed by NRCS personnel on Form SCSCPA-36, 'Wetland Documentation Record', and Form SCS-CPA-026, 'Highly Erodible and Wetland Conservation Determination'. FSA further asserts that the areas in question were wetlands prior to 1972, when the grading was changed on the land north of field 2, and later when beavers dammed up a canal, increasing the water in field 3. FSA acknowledges the area has peculiarities which exist concerning the development of the wetlands, but asserts that they are, and have been, wetlands. FSA further asserts that, if drainages are cleaned out and the areas became drier, a request for a new determination could be made.

It is the appellant's position that the areas in question are artificial wetlands. The appellant asserts that, prior to 1974, when fields were graded to change the drainage, the area around fields 1 and 2 were not wetlands. The appellant further asserts that the area in field 3 was not a wetlands until a canal was installed by- an adjacent neighbor, beavers dammed up that canal, and the water backed onto the appellant's property, creating a wetlands It is the appellant's position that all the property identified as wetlands on his property are actually artificial wetlands, not naturally occurring wetlands.

During the hearing the NRCS clarified that there is a distinct difference between a farmed wetland pasture (FWP) or other naturally occurring we0ands, and an artificial wetland (AM, in that artificial wetlands are not subject to regulation by NRCS in accordance with the National

Food Securities Act. Consequently, a farmer does not lose his eligibility for USDA programs due to the manipulation of an artificial wetland without the consent of the government. The agency and the appellant stipulated that the areas in question in fields 1, 2, and 3 do currently meet the criteria for being wetlands, and that the issue in dispute is whether the wetlands in all three areas are naturally occurring farmed-wetland pastures or artificial wetlands.

During the hearing the agency objected to six of the appellant's exhibits which were identified as "Depositions', because the appellant had not furnished them to the agency in advance of the hearing as required, because the documents do not contain certifications to the truthfulness of the information presented. and because the signatures on the documents were not notarized. The agency was furnished with the documents prior to the hearing so it had time to prepare for the hearing. The agency and the appellant did testify about the contents of those documents, and the record remained open after the hearing to give the appellant until July 8, 1997, to furnish the necessary certifications and notarizations. The agency then had until July 15, 1997, to respond in writing to the appellant's documentation. Also, the agency failed to include a copy of a portion of handbook 180-V-NFSAM, in their exhibits. The agency was given until July 8, 1997 to submit that portion of the handbook, and the appellant had until July 15, 1997 to make any appropriate written -response. The written responses from both parties were submitted in a timely manner. On July, 16, 1997, the hearing record was dosed.

For the record, the appellant objected to the appeal hearing being conducted without giving the appellant 14 days notice of the hearing. The objection was denied because it was the appellant's demand, issued on June 24, 1997, that the hearing be held no later than July 7,1997, which caused the short notice. It took the Division until June 27, 1997, to receive the request and reassign the hearing to a new Hearing Officer. There were only ten days between that date and July 7, 1997, and those ten days included two weekends and the 4h of July holiday.

It was physically impossible to have given 14 days notice and still have held the hearing by July 7, 1997. Hearing Officer Handley did not have an opening in calendar which would have allowed him to conduct the hearing by July 7, 1997, thereby requiring the hearing to be reassigned to Hearing Officer Richardson. The only date Hearing Officer Richardson had available to conduct the hearing was July 1, 1997, so the hearing was conducted on that date. The appellant also objected to the hearing be reassigned to another Hearing Officer, stating that the hearing could not be reassigned without his consent, and that he had not given his consent. That objection was denied for two reasons. First, the appellant presented no documentation to show that the consent of any party to the hearing is necessary before a hearing can be reassigned, and second, it was the appellant's demand which caused to necessity to reassign the hearing.

Based upon the appeal record and upon all applicable laws and regulations, the Hearing Officer makes the following findings of fact, conclusions and determination:

FINDINGS OF FACT

1. The appellant owns farm No.1347, tract 820, fields 1, 2, and 3 . Approximately eight (8) acres of the appellant's land presently meets the criteria for being a wetlands (Agency exhibit DD, appellant exhibit 7, Agency and appellant's testimony, tape 1, side 1)

2. Starting in 1955, soil mapping was conducted by the Soil Conservation Service, covering an area which includes the appellant's farm. In 1960, a soil survey was issued by the Soil Conservation Service. AD of the land areas in dispute in fields 1, 2, and 3 are shown on that soils map to be soil type Cs. Soil type Cs is identified as Cass Fine Sandy Loam, having soils with a water table of 0-1 foot and having hydric soils as inclusions

within R. (Agency exhibit DD - soils map with attached Hydric Soil Interpretations, J. Jasmer testimony, tape 2, side 1)

3. In 1972, the appellant started irrigating the land north of field 2. Over the next year or two, the appellant graded that land so A sloped consistently from north to south and drained into field 2 and part of field 1. The natural drainage in field 2 was then enhanced to remove field 3 water from the area. (Appellant's testimony, tape 2, side 2)

4. Prior to 1985, the areas in dispute were wet and difficult to farm. (Appellant's exhibit 7 Henry Santin deposition, agency exhibit DD - soils map)

5. In 1985, Frank Santin, who owns property adjacent to the appellant, constructed a canal his property. That canal altered the naturally occurring watershed which flowed from appellant's property through Mr. Santin's property. After the canal was constructed, beaver inhabited the canal and dammed it up, causing water to back up onto field 3 of appellant's farm. Over the next several years, the dam was tom out at least three times, only to be replaced by the beaver. In..1995, the beaver were destroyed, and the dam removed. (Agency and appellant testimony in numerous places, appellant's exhibits 2,3,5,6,7)

6. On August 6, 1995, the appellant informed FSA he was going to clean out a portion of the ditch which is in field 3. On September 20, 1995, NRCS signed off on the appellant's form AD-1026, "Highly Erodible Land Conservation (HEL) and Wetland Conservation (WC) Certification'. On November 7, 1995, NRCS completed Form SCS-CPA-026, "Highly Erodible Land and Wetland Conservation Determination'. On November 7. 1995, NRCS notified the appellant that the work he wanted to do was in a wetlands (Appellant testimony, agency exhibit X, Z, DD)

ANALYSIS

7 CFR 12 is the regulation dealing with wetlands. The agency determined that there now, and for years have been, farmed wetland pastures totaling approximately 8 acre,, the appellant's farm. The appellant agreed during the hearing that the land in question presently meets the criteria for being a wetlands but he asserts that the land was not wet before two activities occurred in 1972 and 1985, which caused the lands to become wet. The two parties also agreed during the hearing that there is a distinct difference between farmed wetland pastures and artificial wetlands.

The decision at issue was defined during the hearing to be whether the land in question is a farmed wetland pasture or is an artificial wetlands There is no question but that the 1972 grading of field 1 and the canal constructed by his neighbor in 1985, caused the areas in dispute to become wetter than they had been prior to those activities. The sole issue to determined by the Hearing Officer is whether the land in dispute was already a wetland prior to those activities, as the agency asserts, or whether the areas were not wetlands prior to those activities, as the appellant asserts.

The documentation and testimony presented by both the agency and the appellant support the agency's position.. First, the agency presented a soil survey, issued in 1960, which shows the presence of hydric soils in the disputed areas at that time. (Agency exhibit DD) Second, the deposition of Henry 'Bud' Santin, Jr., shows that the area in dispute 'has always been wet and difficult to farm because of standing water..." The same deposition goes on to say that the 'serious difficulty in farming this area started about ten years ago'. (Appellant's exhibit 7).

This clearly shows that a wetland area, which had been somewhat of a problem, became a serious problem after the construction of a canal on the neighbors property about ten years ago. The canal was constructed in 1985, about 12 years prior the time the deposition was made. It is not reasonable to assume that the land which was wetland in 1960 somehow became dry, only to again become wet due to the activities described by the appellant. The reasonable and logical explanation is that the wells became more wet after those activities occurred.

The appellant stresses that the dams built by beaver in a manmade canal should be considered an artificial source of the wetlands because the beaver were drawn there by the manmade structure. The Hearing Officer makes no evaluation of that position because it is simply not relevant. The agency has shown that the area was already a wetland prior to the construction of that canal.

CONCLUSIONS

CFR § 12.2 defines a farmed wetland pasture as wetland that was manipulated and manage for pasture or hayland prior to December 23, 1985, and on December 23, 1985, met the hydrologic criteria for being a wetlands § 12.2 also defines an artificial wetland as being an area that was formerly non-wetland, but now meets wetland criteria due to human activities, such as, among other things, a wetland that is temporarily or incidentally created as a result of an adjacent development activity.

In this case the appellant and agency agree that the land in dispute currently meets the criteria for being a wetlands but disagree on how the land came to be wetlands The agency has taken the position that the land is a naturally occurring farmed wetland pasture, while the appellant's position is that the land is an

artificial wetlands The soils map issued in 1960 shows that the land in question contained hydric soils at that time. This shows that the lands in question were wetlands in 1960. The man who has custom farmed the land for many years confirms that land became a serious wetland problem about ten years ago, but that it was difficult to farm due to standing water prior to that time. The agency's decision, that the 8 acres in question are farmed wetland pastures, is supported by the regulations and the facts. (FOF 1,2,3,4,5,6)

2. CFR 11. §11.8(e) requires that the appellant bear the burden of proving that the adverse decision of the agency is erroneous and should be reversed. The appellant has not met that burden of showing that FSA's decision, that the 8 acres in question are farmed wetland pastures, is in error.

IT IS HEREBY DETERMINED:

1. The decision by the agency, that a acres located in farm No. 1347, tract 820, fields 1. 2, and 3, are farmed wetland pastures, is upheld.

2. The appellant and agency may each obtain a copy of the audio tapes made of the proceedings of this hearing at no cost. The appellant and the agency may obtain the copies of the audio tapes by requesting them in writing from the National Appeals Division Assistant Director at the address below:

   Western Assistant Director
   National Appeals Division
   755 Parfet, Suite 494
   Lakewood, CO 80215-5506

3. The appellant may request a review of this decision in accordance with the attached "Notice of Right to Request Review and Request

for Review".
Dated this 22nd day of July, 1997.

"s/Jack L. Richardson"
JACK L. RICHARDSON
Hearing Officer
National Appeals Division

Attachments: "Notice of Right to Request Review"

UNITED STATES DEPARTMENT OF AGRICULTURE
NATIONAL APPEALS DIVISION

In the matter of

ROBERT J. PROKOP AND NAD LOG No. 97000731W

FARM SERVICE AGENCY **APPELLANT**
EXHIBIT: 7

DEPOSITION OF HENRY "BUD' SANTIN JR.

This statement, given on behalf of the above-entitled case, is given on the 16th day of June, 1997 in the rural Palmer, Nebraska area regarding testimony concerning the Farm Service Agency Wetlands Determination with regard to Robert J. Prokop M.D.

I have custom farmed Robert Prokop's 130 acres on which the Wetlands Determination has been made. for 20 years. The Southeast corner which contains a dry creek channel which courses through the property, has always been wet and difficult to farm because of standing water after drainage from Fred Whitney's farm which drains the Northern Sections of land toward to Loup River and enters Prokop's property through a large culvert under the gravel road. The serious difficulty in farming this area started about ten years ago.

At that time, beavers moved into a canal that was constructed before I started farming the property and built several dams. These dams backed up water into the dry creek bed and became serious enough to flood out crop land. These problems usually began after high rainfall but the creek became active in the spring when snow melted. The beavers had made dens into the side of the canal under Prokop's land

and when heavy machinery was in the area, it occasionally would buckle the ground and make farming extremely difficult.

A number of the beavers were killed and they finally moved out about two years ago. The dry creek bed which was on Robert Prokop's southeastern corner, contained vegetation, muck, crop residue such as stalks, and grassy material. The cattails and other vegetation on the bank started about ten years ago when the beavers had dammed the canal on Frank Santin's property. Frank Santin had also had the dams removed several times from the canal but the beavers would move back in and were only stopped when they were killed.

Since Robert Prokop dredged out the river creek channel, the wetness problem that was present in the farming operation has markedly decreased. Water still stands in the creek bed because at the fence line, Frank Santin, who owns the adjacent property, has not removed the silt and vegetation that blocks the creek bed and channel to his canal. This in turn continues to place water in the dredged out dry creek bed on Prokop's Southeast corner.

With adequate drainage, there would be no water standing in the dry creek bed and the wet saturated soil that has been a problem in the immediate area of the dry creek bed would be dried up allowing easier farming processes and operation.

's/ Henry "Bud" Santin Jr."
HENRY "BUD" SANTIN JR.
RFD #2, Box 143
Palmer, Nebraska 68864

DATED June 16th, 1997.

UNITED STATES DEPARTMENT OF AGRICULTURE
NATIONAL APPEALS DIVISION

In the matter of	)	
	)	
ROBERT PROKOP	)	NAD Log No. 97000731W
	)	
and	)	
	)	
FARM SERVICE AGENCY	)	

NOTICE OF RESPONSE TO APPELLANT'S REQUEST FOR WITNESS APPEARANCE

The Appellant has requested the presence of Agency employees to serve as witnesses during the upcoming hearing. Upon reviewing all available information, the following Determinations have been made:

1. On May 22, 1997, the Appellant requested the presence of seven current and one retired Agency employee at the administrative appeal hearing.

2. On June 18,1997, the Western Regional Office of the National Appeals Division (Division) notified the Appellant that he must submit specific information to the Hearing Officer about the requested witnesses before a determination would be made as to the necessity of their presence,

3. On June 26, 1997, the appeal was reassigned from Hearing Officer Paul Handley to Hearing Officer Jack Richardson. The appeal hearing is scheduled for July 1, 1997, in Omaha, Nebraska.

4. The Appellant has not presented information which would explain what specific information the requested witnesses would provide, why that information would be relevant to the adverse decision, or why that information cannot be presented by witnesses of the agency who will attend the hearing. The Appellant's request for the presence of the additional witnesses is denied.

5. The Appellant has also furnished "depositions" for Fred Whitney, Frank Santin, Jr., Eugene Lassek, Dale Lesiak, John Santin, and Henry "Bud" Santin, Jr. The documents do not contain a statement which affirms the accuracy of the information being presented, and none of the signatures are notarized so the identities of the authors are confirmed.

6. If the aforementioned persons are not going to be present at the hearing as witnesses, the documents should be formalized to confirm the accuracy and identity of the witness. If those persons will be present at the hearing, no formalization of the depositions is necessary.

Dated this 26th day of June, 1997.

"s/ANN S/ GILBERT"
ANN S. GILBERT
Acting Assistant Director
National Appeals Division

Copies of this Notice mailed postage paid to:

APPELLANT
Robert Prokop
P.O. Box 14
Wilber, NE 68465-0014

AGENCY STATE OFFICE
Nebraska State FSA Office - Attn: Appeals Coordinator

AGENCY REPRESENTATIVE
Darlene Wyrick
Farm Service Agency
P.O. Box 57975
Lincoln, NE 68505-7975

NAD Hearing Officer - Jack Richardson

UNITED STATES DEPARTMENT OF AGRICULTURE
FARM SERVICE AGENCY
NANCE COUNTY FSA OFFICE
P.O. BOX 488
FULLERTON NE 68638

April 10, 1997

ROBERT PROKOP
PO BOX 14
WILBER NE 68465-0014

Dear Robert:

After careful consideration, the County Committee (COC) was unable to take favorable action on your request to have the wetland call on Farm # 1347 tract 820 Field #3 determined in error. The specific reasons for the COC,s action are as follows:

> No determination could be made by the COC that the Farmed wetland Pasture call was incorrectly made by the State conservationist. The COC does acknowledge that you state no wetland exists based on the fact proper drainage has not occurred on the drainage canal to the North of Field #3. You state that the improper maintenance of the drainage canal over many years has backed up the water onto the area designated as Field #3. You, also state that the new wetland rules have several references to the handling of artificially created wetlands. Furthermore you note the beaver dams on the drainage canal have also contributed to the development of hydrophytic vegetation aud hydric soil which bas occurred on the area. Lastly, you contend you were required to be officially notified of wetland existence according to the 1905 law. Thus, you state since you received no notification, you can not be told now that a wetland does exist. You are worried that once a "wetland always a wetlands", will be the common procedure followed by government agencies.

COC Decision:

The COC does admit that the area has peculiarities which do exist concerning the development of a wetlands However, based on the guidelines currently in the FSA office and the NRCS office the wetland determination is not determined to be in error. The NRCS has documented the reasons for the call on Form SCS-CPA-36 and the Nebraska State Conservationist has reviewed this determination as stated in the letter to you dated May 30, 1996. The COC also, notes the letter does State that if the area North of Field #3 had the drain cleaned out and designated Field #3 became drier, a request for a new determination could be made. Thus, based on the current office guidelines and the documentation completed by the NRCS personnel (SCS-CPA-36 Wetland Documentation Record and SCS-CPA-026 Highly Erodible and Wetland Conservation Determination), the COC can find no reason to state an error occurred in the wetland determination. This decision is basted on Handbook 6-CP (Rev. 2) paragraphs 18, 200, 403. and 510.

If you believe this decision or the facts used in this case are in error, you may pursue any or all of the following options .

Reconsideration

If you have questions concerning this decision Or the facts used in making it and desire further explanation, you may write the Nance County FSA Office at Box 488, Fullerton, NE 68638, to request reconsideration by the COC. This written request must be received in the County office no later than 30 days from the date of this letter. You must present any now information, evidence and/or Possible alternatives along with your request. You may also bring a representative or legal counsel with you to any meetings that may result from your request for reconsideration. You may skip this step in the informal process and select one

of the following options. If you do, you will automatically waive your right to reconsideration.

Mediation

You have he right to request mediation of the issues in this decision. Informal mediation may enable us to narrow and resolve these issues by agreement. If you request mediation, FSA will assist you in deciding whether mediate our decision, you may contact the Nebraska Farm Mediation Service at 1-800-446-4071. If you decide to mediate, your must request mediation within 18 calendar days of the date of this letter. Send your request to the Nance County FSA Office at box 488, Fullerton. NE 68638. Each party to a mediation will pay a $20.00 per hour fee. If mediation does not result in resolution of these issues, you have the right to continue with a request for an appeal hearing as set forth below. When mediation is concluded you will be notified of the result and the number of days remaining to request an appeal, if applicable. Mediation does not take the place of, or limit your rights to, an appeal to the State Committee and/or the National Appeals Division (NAD). You may skip mediation and request an appeal hearing. However, in doing so, you will automatically waive your rights to mediation and reconsideration.

Request an Appeal

You may request an appeal hearing rather than reconsideration or mediation. Your appeal options are normally the Nebraska State PSA Committee and/or the National Appeals Division (NAD) However, since no program benefits are affected by this decision, no appeal is necessary to the State Committee. Therefore, you have the following appeal option.

Appeal to NAD

You may request an appeal hearing by NAD rather than or in lieu of

reconsideration or mediation. Your request should be sent to: National Appeals Division, Western Regional Office, 755 Parafet Street, Suite 494, Lakewood, Colorado 80215-5506. The written request must be postmarked no later than 30 days after the date of this letter.

Please remember timely requests for a reconsideration to the County Committee, a request for mediation, or an appeal to NAD are required to ensure this current decision does not become the final decision and no further consideration on the matter can be given.

Please contact this office immediately if you have any questions.

Sincerely,

"S/BRUCE J. COFFEY"
Bruce J. Coffey
County Executive Director
Nance County FOA Office

CC: William Gilg, Nance County NRCS Office